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Supreme Court of the United States

OCTOBER TERM 1948

No. .....

MURRAY W. GARSSON,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

This is an application by Murray W. Garsson for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed, by a divided Court, a judgment of the District Court of the United States for the District of Columbia convicting petitioner on three separate counts.

The Opinion Below

In the Court of Appeals the majority opinion was written by Judge Prettyman and a dissenting opinion by Judge Stephens. The opinions have not yet been officially reported.

Summary Statement

Petitioner was indicted together with three others. The indictment contains four counts, the second of which was abandoned by the Government during the trial.

The first count of the indictment alleges a conspiracy both to violate § 203 of Title 18 and to defraud the United States in that Andrew J. May, while a Congressman, received payments for services claimed to have been rendered by him to the other defendants (A.* 2). It is a lengthy count containing twelve separate subdivisions A. 2-7), the last of which sets forth thirty-five overt acts (A. 7-12). There is no claim that the United States suffered any pecuniary loss by reason of May's various interventions. Nor is there any count under any of the bribery statutes.

The third count of the indictment charges the substantive offense of violation of § 203 by May, and that the other defendants aided and abetted him in violating that statute (A. 14-15). The last count is similar to the third count except that it refers to additional payments alleged to have been received by May (A. 15, 16).

The defendants were Andrew J. May, a member of the House of Representatives and Chairman of its Committee on Military Affairs; Henry M. Garsson, an officer, director and stockholder in two corporations, Erie Basin Metal Products, Inc. and Batavia Metal Products, Inc., located near Chicago, Illinois, which were engaged in the production of war material under contracts with the War Department; Murray W. Garsson and Joseph F. Freeman, employees of these corporations.

It is important to bear in mind that the charge of the indictment in all its counts is that petitioner, together with others, were the very persons who had made the alleged payments to May for the services alleged to have been rendered by May.

Motions were made by the various defendants to dismiss the indictment on numerous grounds, not all of which are here involved. In this application we shall refer only to the motions made by petitioner Murray Garsson.

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*The references are: A. to appellants' appendix; O. to the opinions of the Court of Appeals.

Petitioner urged: (a) that the indictment was duplicitous since it charged both a conspiracy to commit an offense against the United States in violation of § 203 *and* a conspiracy to defraud the United States (Item 1, A. 35); (b) that he could not be charged as an aider and abettor under Counts III and IV since the statute punishes only the receiver of the money and not the payer (Items 3 and 4, A. 35); (c) that he could not be charged as conspirator in the first count because the crime charged was one which involved the necessary participation of more than one party and he was also charged with the substantive offense (Item 6, A. 36, 37); (d) that the Grand Jury was unlawfully constituted because more than one-half of its members were Government employees and some of the persons chosen were disqualified (Item 7, A. 37).

The trial was held before Hon. Henry Schweinhaut and a jury and continued from April 22 to July 3, 1947 (A. 98-135). At the end of the Government's case on May 14th, motions were made for judgment of acquittal (A. 102-103) which were denied (A. 104) except as to defendant Freeman. These motions were renewed at the end of the entire case on June 26, 1947 (A. 132, 133), and likewise denied (A. 134).

Despite the fact the indictment had been upheld as charging a single conspiracy to do *two* things, i.e., defraud the Government and violate § 203, the jury was instructed that it could find defendants guilty if it believed they conspired to do *either*. It is thus impossible to determine whether the jury found that petitioners conspired only to violate § 203 or only to defraud the United States or to do both.

The jury convicted May, petitioner, and his brother Henry on the three counts which were submitted to them (A. 135). Subsequently motions were made to set the verdict aside and for acquittal (A. 137), for arrest of judgment (A. 138) and for a new trial (A. 140-148). These motions were all denied on July 25th (A. 150). At that time the Court sentenced petitioner for a period of 8 months to 2 years on each of the three counts, which sen-

tences were to run concurrently (A. 151). Petitioner has been at liberty on bond pending his appeal.

Appeals were duly prosecuted by all convicted defendants to the Court of Appeals for the District of Columbia and resulted in the affirmance by a divided Court. Judge Stephens in dissenting agreed with the contention which petitioner had made concerning the duplicity of the first count of the indictment and the impropriety of charging him either as conspirator under Count I or as aider and abettor under Counts III and IV.

It is not necessary to burden the Court with a review of the voluminous evidence, which comprises approximately 8,000 pages and numerous exhibits. It is sufficient at this point to indicate that May was charged with acting as an intermediary for the other defendants in urging action by various War Department officials to enable the Garsson companies to complete performance of contracts for the manufacture of implements of war. It was charged that May also acted as intermediary in connection with certain personal matters of the Garssons. The Government further contended that money was paid to May for these interventions.

The defendants maintained that the uncontradicted evidence showed that all of the money received by May was paid to him in reimbursement of monies expended by him and not in payment for any services. At the trial all the defendants contended, moreover, that whatever was done by May was done by him in his capacity as a Congressman interested in furthering the war effort in order to redress legitimate grievances brought to his attention by the Garssons.

It was the contention of defendants at the trial that the Government had wholly failed to prove any conspiracy between the various defendants and that evidence of acts of one or more of the defendants out of the presence of the others was improperly received.

In support of their contention that May was motivated by patriotic considerations in interceding for the corpora-

tions, defendants sought to call various witnesses to corroborate the testimony of May and of Henry M. Garsson as to their motives. The Court refused to permit such testimony to be offered.

In its charge to the jury the Court accepted a request formulated by the Government known as Request #12 (A. 135, 136), in which the Court pointed out that it had refused to permit the introduction of the evidence above referred to on the ground that it was immaterial whether the corporations in question were improperly restricted in their activities or discriminated against, and whether various other requests made by May on the Garssons' behalf in connection with personal matters were in fact justified. The granting of this request was one of the grounds of the motions for a new trial (Item 39-j, A. 144).

Insofar as the particular portions of the record become relevant to the discussion of the various legal points hereinafter outlined, they will be discussed in the argument which follows.

Statement on Jurisdiction

The judgment of the United States Court of Appeals was entered on January 24, 1949. Timely application for rehearing was made to that Court. The application for rehearing was denied by that Court on April 6, 1949. This Court has given petitioners until June 4, 1949, in which to file this application. Jurisdiction is invoked under Judicial Code, § 1254(a).

Statutes Involved

Title 88:

> § 203. *Receiving pay by Member of Congress in matters affecting United States.* Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance

in office, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

The following statutes are set forth in full in the appendix to this petition:

§ 202, Title 18, United States Code;
§ 88, Title 18, United States Code.

The Questions Presented

The following questions are presented:

1. Was petitioner Murray W. Garsson properly charged in the first count of the indictment with having conspired with Andrew J. May to commit the offense of receiving money in violation of 18 U. S. C. A. 203, in view of the fact that the conspiracy charged was the consummation of an offense requiring the participation of all of the persons charged, namely, the payers of the money and the receiver of the money?

2. Was petitioner Murray W. Garsson properly charged in Counts III and IV of the indictment as aider and abettor of Andrew J. May in view of the fact that § 203 punishes only the receiver of the money, not the person who pays it, and that petitioner Garsson was charged as payer of the money?

3. Is the first count of the indictment duplicitous because it charges a conspiracy both to commit an offense against the United States *and* to defraud the United States, whereas the statute (18 U. S. C. A. 88) punishes only a conspiracy "either to commit any offense against the United States *or* to defraud the United States"?

4. Should the indictment have been dismissed because of the inclusion as members of the Grand Jury of various Government employees and of two disqualified persons where petitioner had no opportunity to examine members of the Grand Jury for possible bias?

5. Should the motion for a directed verdict as to Count I have been granted because the Government failed to prove the making of a conspiracy?

6. Should a new trial be had because the Court refused to permit petitioners to introduce evidence to explain Congressman May's actions or because the Court granted instruction #12 requested by the Government?

Reasons for Granting the Writ

The writ should be granted because federal issues are involved which have not heretofore been and which should be determined by this Court, since they are issues of great public importance and the decision below contravenes principles established by decisions of this Court and is in conflict with decisions of other Courts. We shall elaborate these reasons in our discussion of the various questions above set forth.

1 and 2. Whether the payers of money to a Congressman can be charged either as conspirators to violate § 203 or as aiders and abettors to a violation of that section has never been determined by this Court. We submit, however, that the decision in *Gebardi* v. *United States*, 287 U. S. 112,

is applicable and was misunderstood by the Court of Appeals. Cf. *Pinkerton* v. *United States*, 328 U. S. 640. The ruling of the Court of Appeals that petitioners could be charged as conspirators to violate § 205 was especially prejudicial to them because the jury was allowed to find them guilty of that offense alone, regardless of their guilt of conspiracy to defraud the United States.

3. The decision of the Court of Appeals that Count I of the indictment was not duplicitous is in conflict with *United States* v. *Dembowski*, 252 Fed. 894 (E. D. Mich.) and *Sugar* v. *United States*, 252 Fed. 79 (C. C. A. 6th). This ruling is at variance with the Court's charge which permitted the jury to find defendants guilty *either* of conspiracy to violate § 203 or to defraud the United States, despite the fact that the indictment charged a conspiracy to accomplish both objectives and that it had been upheld on the theory that but one conspiracy was charged. It is inconsistent with the rule approved by this Court in *Nye & Nissen* v. *United States*, 337 U. S. (decided April 18, 1949).

4. Whether Government employees may properly sit on a Grand Jury in a case such as this has never been determined by this Court. In view of the impossibility of ascertaining the possible actual bias of such jurors the reasons which led this Court to uphold the practice of permitting such employees to serve on petit juries do not apply (*United States* v. *Wood*, 299 U. S. 123; *Frazier* v. *United States*, 335 U. S. 497).

5. In ruling that sufficient evidence was received to permit submission to the jury of the conspiracy count (No. 1), the Court of Appeals applied a rule of law in conflict with that announced by this Court in *Glasser* v. *United States*, 315 U. S. 60.

6. In upholding the exclusion of evidence offered by petitioners to prove the motives which activated Congressman May, the Court of Appeals ignored the aspect of Count I which charged petitioners with defrauding the United States. In view of the fact that all defendants denied that May was paid anything, this evidence might have aided the jury in resolving that issue. The ruling that intent was here immaterial is in conflict with decisions such as *Miller* v. *United States,* 120 F. (2d) 968 (C. C. A. 8th); *C. I. T. Corp.* v. *United States,* 150 F. (2d) 85 (C. C. A. 9th); *Haigler* v. *United States,* 172 F. (2d) 986 (C. C. A. 10th). The same observations apply to the ruling with respect to the granting of Government's request #12.

ARGUMENT

I. Can the first count properly include a charge of conspiracy to violate § 203 of Title 18?

The first count charged the defendants with having conspired both to defraud the United States and to violate § 203. We are dealing in this point only with the latter aspect of the count.

Petitioner moved to dismiss the count because of the inclusion of the reference to § 203 on the ground that since the crime there described necessarily involves the cooperation of more than one person and the crime was in fact committed, the co-operating persons may not be convicted of conspiracy. In support of this contention petitioners cited numerous cases, commencing with *United States* v. *Dietrich,* 126 Fed. 664, and concluding with *Pinkerton* v. *United States,* 328 U. S. 640. The rule is well stated in the last of these cases by Mr. Justice Douglas at page 643:

> "• • • There are, of course, instances where a conspiracy charge may not be added to the substantive

charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States* v. *Katz*, 271 U. S. 354, 355-356; *Gebardi* v. *United States*, 287 U. S. 112, 121-122. Another is where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime. *Gebardi* v. *United States, supra.*"

Both these considerations are present in the case at bar. Nevertheless, the majority of the Court of Appeals, while recognizing that the matter was not "free from doubt" (O. 8), held that all of the parties could properly be charged as conspirators. It did so, relying chiefly on *United States* v. *Holte*, 236 U. S. 140.

We submit that the principles announced by this Court in *Gebardi* v. *United States*, 287 U. S. 112, compel a different conclusion and that the views expressed by Judge Stephens in his dissent are sound.

Both the *Gebardi* and the *Holte* cases arose under the Mann Act and involved the right to prosecute the woman transported across state lines. In the *Holte* case Justice Holmes held the indictment of the woman good; in the later case Justice Stone reversed the conviction of the woman. To understand the applicability of these cases to ours they must be studied in some detail.

In the first place, it should be borne in mind that the Mann Act differs from the statute here involved in that it does not necessarily require participation of more than one person, since the woman in the case might be transported while drugged or otherwise not able freely to exercise her will. Where, as here, the offense is payment of money to a Congressman for services, it is obvious that both the payer and the giver must necessarily be conscious and deliberate participants.

It was only because of the possibility that the woman might be a wholly unwilling participant that Justice

Holmes held not applicable to the situation in the *Holte* case the general rule which he recognized and for which we are here arguing, namely, that where the concurrence of more than one person is necessary and the crime has been committed, there can be no prosecution for conspiracy but only for the substantive offense. Justice Holmes held the indictment good over the contention made in the Court below that the woman who was intended to be protected could never be guilty of the offense because it might be shown at the trial that the woman might be the active instigator, as, for instance, in order to blackmail the man. In view of the fact that this case arose on a bare indictment which merely charged transportation, it can have no general application.

That was recognized by this Court in the *Gebardi* case. There, after trial, this Court unanimously held that the woman could not be prosecuted for conspiracy. Justice Stone expressly recognized the rule contended for here, namely, that where the crime depends on the agreement of more than one person there can be no indictment of those persons for conspiracy. He said:

> "• • • where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy • • •" (p. 122).

The suggestion in the majority opinion here (O. 9) that this decision rested on the "policy" of the Mann Act is based on the failure properly to analyze the decision. For the part of it which rests especially on the Mann Act follows what we have just quoted and is concerned with the circumstance that the Mann Act deals both with voluntary and involuntary transportation. In the case at bar there is no similar problem since there can never be a case of "involuntary" payment to a member of Congress for services.

Especially significant is the concluding portion of Justice Stone's opinion (p. 123) where he says:

> "It is not to be supposed that the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would render the former an abettor or a conspirator * * * or that the acquiescence of a woman under the age of consent would make her a co-conspirator with the man to commit statutory rape upon herself."

We have, therefore, here the classic case of a conspiracy between the very persons without whose cooperation the substantive offense charged could not have been committed. The authorities are clear that there can be no prosecution for conspiracy in such a situation.

We submit also that to sustain Count I despite the inclusion in it of the charge of conspiracy to violate § 203 was necessarily prejudicial to petitioners. The jury was expressly instructed that it might find defendants guilty if they believed that defendants had conspired either to defraud the United States or to violate § 203 (Judge Stephens' opinion, O. 26). Under familiar principles a verdict cannot stand when the jury was permitted to find it on a ground which should not have been submitted to it: *Stromberg* v. *California*, 283 U. S. 359; *Williams* v. *North Carolina*, 317 U. S. 287; *Haupt* v. *United States*, 330 U. S. 631, 641, n. 1; *Terminiello* v. *Chicago*, decided May 16, 1949.

II. Can payers of money to a Congressman for alleged services be charged as aiders and abettors of that crime?

Counts III and IV charge that petitioner and his brother Henry violated § 203 in that they aided and abetted May, while a Congressman, in receiving money for services to be performed in violation of the statute.

It is conceded that this statute punishes only the Congressman who accepts compensation for services in matters pending before a government department. It makes no reference to the payer of the money. The Court of Appeals expressly stated that the receiver "alone could commit that statutory offense" (O. 8). It is important to bear in mind the distinction between this statute and § 202, which deals with bribery and which punishes the giver as well as the receiver of the bribe.

The majority of the Court below was of the opinion that the distinction between these two statutes should be ignored merely because there is a general aiding and abetting statute (O. 9). They ignored the fact (referred to by Judge Stephens—O. 27) that at the time § 203 was originally enacted no aiding and abetting statute existed and that when, in 1909, § 203 was re-enacted (at which time an aiding and abetting statute did exist) it was placed next to § 202 which expressly punishes the giving of a bribe as well as its receipt. This adherence by Congress to the original form of these two statutes suggests that Congress did not intend to change their effect and, merely because of the then existence of an aiding and abetting statute, punish also the payer of the money, who had been expressly excluded from punishment by the form of § 203 itself.

These views are supported by various authorities. In *Lott* v. *United States*, 205 Fed. 28, the Court held that an Indian who purchased liquor could not be punished as the abettor of the vendor, who alone was prohibited from selling it. It has also been stated that under § 207 (one of the special bribery statutes), which like § 203 punishes only the receiver of money, the giver of the money cannot be punished: *United States* v. *Canella*, 63 F. Supp. 377. We have already pointed out that it has been held where a statute punishes only the married party to an adultery the unmarried one cannot be punished as an abettor: *In re Cooper*, 162 Cal. 81, cited with approval by this Court in the *Gebardi* case at page 123.

The matter is further elaborated in the dissenting opinion of Judge Stephens (O. 26-28). The conflict between the views there expressed and the views adopted by the majority on the important matter of the applicability of the general aiding and abetting statute certainly calls for review by this Court.

III. The duplicity of Count I.

As we shall show, the indictment was upheld on one theory and the case tried on another. Thus, the motion to dismiss the indictment was denied on the ground that it charged a single conspiracy *both* to defraud the United States *and* to violate § 203. However, the jury was authorized to find defendants guilty if it believed that they conspired *either* to defraud the United States *or* to violate § 203. In this respect the case at bar differs from *Nye and Nissen* v. *United States,* 337 U. S. , where the indictment charged but a single conspiracy and the case was submitted to the jury on the same theory.

In the case at bar the first count of the indictment makes the charge that defendants conspired "to commit offenses against the United States • • • *and* to defraud the United States" (A. 2). This statement is at variance with the words of the statute (18 U. S. C. A. 88), which punishes persons who "conspire *either* to commit any offense against the United States, *or* to defraud the United States • • •". (Italics ours.)

The Trial Court and the majority of the Court of Appeals rejected petitioner's contention that the statute described two different kinds of conspiracy, and that the indictment was duplicitous because it included both in a single count. They reached this result largely on the authority of *United States* v. *Manton,* 107 Fed. (2d) 834. There the Court of Appeals for the Second Circuit held good an indictment substantially the same in form as is the present one. But, as Judge Stephens points out in his

dissent here, the Court in that case did not at all consider the argument here made that § 88 deals with two possible conspiracies. Judge Stephens also thought the decision in that case had been influenced by the circumstances that the same facts were relied on both to prove defrauding and a violation of § 203. Here the situation is entirely different in that respect.

Judge Stephens, in support of his dissent which accepted petitioner's contention (O. 19), relied on *United States* v. *Dembowski*, 252 Fed. 894, and *Sugar* v. *United States*, 252 Fed. 79. The first of these cases held that a statute consisting of various parts all preceded by the word "or" created several distinct offenses and not one single all-embracing offense. The latter case applied that principle to § 88. The conflict between these cases and the *Manton* case calls for resolution by this Court.

While the Court of Appeals treated the first count as charging a single conspiracy to accomplish two objectives, the case was not tried on any such theory. Had it been, petitioner would have been entitled to an acquittal unless the jury was satisfied that *both* objectives were embraced in the conspiracy. But, as Judge Stephens points out (O. 26), the jury was instructed that it could convict if *either* objective was included. The Trial Court thus accepted the construction of the count placed upon it by petitioner that it embraced two offenses in charging the jury, while rejecting that contention when ruling on the indictment. Such judicial inconsistency also calls for review by this Court.

IV. With regard to Grand Jury service by Government employees.

Petitioner challenged the composition of the Grand Jury on the ground that it consisted by more than half of government employees and that two of its members were completely disqualified. The Court of Appeals summarily re-

jected both contentions (O. 6). It pointed out that seven more than the required number of twelve had concurred in the indictment, so that the presence of those disqualified was immaterial. It ruled, following *Frazier* v. *United States,* 335 U. S. 497, that government employees are eligible to sit as jurors.

Petitioner maintains that the *Frazier* and other cases relied on by the Government and the Court of Appeals are inapplicable here because they all deal with petit juries where a defendant has an opportunity to examine talesmen for possible bias, and that such an opportunity is not available in the case of Grand Juries. The question is interesting and important. It should be passed upon by this Court.

CONCLUSION

We respectfully join with Andrew J. May and Henry M. Garsson in the various other points raised by them which have not been here raised or developed in this petition. We also join with them in their request that because of the voluminous character of the record and our impaired financial position, we be relieved from printing the record.

Respectfully submitted,

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APPENDIX

§ 88. (CRIMINAL CODE, section 37.) CONSPIRING TO COMMIT OFFENSE AGAINST UNITED STATES. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. §5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, § 37, 35 Stat. 1096.)

§ 202. (CRIMINAL CODE, section 112.) MEMBER OF CONGRESS TAKING CONSIDERATION FOR PROCURING CONTRACT. Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being an officer or agent of the United States, shall directly or indirectly take, receive, or agree to receive, from any person, any money, property, or other valuable consideration whatever, for procuring, or aiding to procure, any contract, appointive office, or place, from the United States or from any officer or department thereof, for any person whatever, or for giving any such contract, appointive office, or place to any person whomsoever; or whoever, directly or indirectly, shall offer, or agree to give, or shall give, or bestow, any money, property, or other valuable consideration whatever, for the procuring, or aiding to procure, any such contract, appointive office, or place, shall be fined not more than $10,000 and imprisoned not more than two years; and shall, moreover, be disqualified from holding any office of honor, profit, or trust under the Government of the United States. Any such contract or agreement may, at the option of the President, be declared void. (R. S. § 1781; Mar. 4, 1909, c. 321, § 112, 35 Stat. 1108.)

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APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. ~~840~~ 100

ANDREW J. MAY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

No. ~~841~~ 101

MURRAY GARSSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

No. ~~842~~ 102

HENRY M. GARSSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPREME COURT OF THE UNITED STATES

No. —

ANDREW J. MAY, *Petitioner,*

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI

Instructions of the United States District Court for the District of Columbia to the Jury.

July 2, 1947

Charge to the Jury

"The Court:

The Court: (Schweinhaut, J.) Now, ladies and gentlemen: I am going to try to discuss the law of this case with you briefly.

I don't intend to comment upon the evidence except only as it may be necessary to make clear some principle of law concerning which I will have to instruct you.

To comment upon the evidence otherwise would cause me to do almost as comprehensive a job, in order to do it fairly and objectively and thoroughly, as counsel have, and I think you have heard enough argument in the case.

Moreover, the case has been very well tried. It has been very well argued by the lawyers on both sides. And you have listened, as both counsel have told you, with unusual attention, for which the Court also is grateful.

I have had occasion to comment in that regard to you before, and I want you to continue your patience until the matter is finally decided by you.

You have been told that it is an important case. Of course it is an important case, but all the cases in the courts are important. The cases you have already tried in this court are important—were important—and I don't want you to lose your objectivity, which it is necessary that you maintain, by getting your mind off on the avenue of thought as to how important the case is.

This case does call for a high degree of objectivity and a thoughtful application of commonsense, but I have no fear whatever that you will give it that.

It has been a long case and counsel on neither side are to blame for that, in my opinion.

I think the evidence that this Court admitted was all entirely competent, and that the nature of it was such as to make it a longer trial than any of the lawyers or I thought at the outset it would be.

Actually, however, the issues are quite simple,—really as simple as any case you have tried in this court room, when you come down to the fact of the matter—and I want to talk with you about them in simple language.

I have not prepared a written charge because I would rather talk to you than to read to you, except in some instances I will have to do that, and I want to talk with you in simple language.

This is not a charge drawn for lawyers or law books, but for you who are the triers of the facts in the case.

First I want to remind you of some general principles as to which I have had occasion in the past to instruct you.

First, you are instructed that it is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself but you should do so only after discussing it with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is unreasonable or erroneous.

You should not be influenced though in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor a particular decision or hold an opinion at variance with your own. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors, but you must listen to your fellow jurors calmly and sympathetically and with understanding and with a willingness to appreciate the view that your fellows express so that you won't be just stubborn and resist reasonable persuasion and reasonable argument as to what the facts are in the case, all to the end that your judgment will be an independent but collective, unanimous judgment.

You are further instructed that the attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It is unbecoming for a juror upon entering the jury room to voice an emphatic expression of his opinion on the case or to announce his determination to stand for a certain verdict. When one does that at the outset, his sense of pride may cause him to hesitate to recede from an announced position even though it may be shown that it is fallacious.

Remember that you are not partisans or advocates in this matter, but you are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom, not in the opinions any of you may hold as you retire.

Bear in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case.

To that end, the Court reminds you that in your deliberations in the jury room there can be no triumph other than the ascertainment and declaration of the truth.

Now, also I want to remind you, as I have before, that the indictment is not evidence in the case, nor is the fact that a Grand Jury found an indictment to be considered by you as evidence. It is merely the formal accusation of crime. It is merely the medium or vehicle by which the matter is brought for the first time before jurors, such as you, for final determination as to the truth or as to the validity or invalidity of the accusation, the innocence or guilt, as the case may be, of the defendants.

On the contrary, defendants in a criminal case are presumed to be innocent of the crime charged against them, and that presumption remains with them throughout the trial, and it prevails until and unless in your final deliberations you should become convinced of their guilt beyond a reasonable doubt. Hence, the burden rests upon the Government to establish guilt—not upon the defendants to establish innocence.

Now, a reasonable doubt is what the term implies. It is a doubt based upon reason, arising out of the evidence or lack of evidence in the case.

It is such a doubt as after a full and fair consideration of all the evidence will leave a juror's mind so undecided that he does not have an abiding conviction of the defendant's guilt, that is, a settled conviction of guilt, which he believes will remain unshaken by future thought and reflection.

It is such a doubt as would cause a reasonably thoughtful and prudent person to hesitate to act if confronted with a question of importance concerning his own affairs.

Such a doubt does not arise from mere conjecture, speculation, whim, or caprice, nor from reluctance to convict through feelings of sympathy or mercy. It is a conscientious belief arising only after calm, dispassionate and impartial consideration of all the evidence that there is a reason to doubt the defendant's guilt.

And, of course, it does not imply proof beyond all doubt. Happenings between human beings cannot usually be proven to an absolute certainty. Hence the law does not require it.

It does, however, require as a fair shield of protection that one shall suffer the loss of his good name, of his liberty or his life, as the case may be, until his guilt has been established beyond a reasonable doubt, as I have defined it.

If upon the whole evidence, again not upon speculation or guess or suspicion, but from the evidence in the case there are two equally balanced hypotheses, inconsistent one with the other, a hypothesis consistent with guilt on the one hand, and a hypothesis consistent with innocence on the other, you must take the one most favorable to the defendants.

That means, of course, not just that there are two theories in the case, the one offered through the evidence on the part of the Government and the other—inconsistent with that—offered on the part of the defendants. They must be equally consistent in your mind, after having exercised your reasoning powers and after having given thought in weighing and evaluating the testimony. If you find then that these inconsistent theories are in balance, you must acquit.

In judging of the evidence you must evaluate the testimony of individual witnesses. Only thus can you determine the truth, and it is the truth you seek.

Bring to that task your knowledge of human nature; your commonsense; your ability to judge of men; their sources of knowledge; their intelligence; their motives; their intentions, all as you may discern the real character behind the spoken words and measure their weight of truth and accuracy.

You may, of course, in considering the testimony of individual witnesses, take into account their manner and demeanor and conduct on the witness stand.

Now, interest in those things involved within the controversy or its results; friendship or animosity towards persons concerned therein, and many other human factors, may or may not affect the desire and capacity of a witness to tell the truth.

Give to the testimony of each witness that weight and that weight only that you believe it is entitled to when viewed in the light of these considerations and in the light of all the other evidence in the case.

Now, in weighing the testimony, in judging of the plausibility or implausibility of the story that the witnesses have told, you are instructed that if in your opinion any witness has testified falsely concerning a matter as to which he could not reasonably be mistaken, you may disregard and reject all or any part of the testimony of such witness.

You are instructed that the fact that the defendant, Murray Garsson, has not testified in his own behalf should not be considered or construed in any way against him, and you are not at liberty to indulge in any presumption or inference because he has not testified in his own behalf. He has a right to testify, or not, as he pleases.

The defendants, May and Henry Garsson, have introduced evidence on their behalf to the effect that their reputation for honesty and integrity is good. You are instructed in this respect that as a matter of law the circumstances of a case may be such in your minds that evidence of good character may alone create a reasonable doubt although without it the other evidence would be convincing. That evidence is to be considered and weighed with all the other evidence in the case, and you may consider, if you find that it is so when you have evaluated the evidence, that it alone may create a reasonable doubt, and that is for you to determine.

Now, in that connection, I have granted defendants' request for instruction, which reads as follows, and I will read it as they submitted it to me:

Certain character witnesses have said that they had heard that Henry M. Garsson, one of the defendants, was indicted, tried and acquitted, of an alleged violation in a District Court in New York; and in connection therewith and prior thereto, was dismissed from the Revenue Department, and that Henry M. Garsson was later denied admission by the New York State Bar Committee, but that this did not affect their opinion of the reputation of the said defendant. This evidence of the prior and of refusal of admission to the Bar must not be considered by you as substantive evidence or as affecting Henry M. Garsson's credibility as a witness. It was only offered for the purpose of affecting the credibility and or knowledge of the

character witness himself and cannot be used in any way as evidence against the defendant, Henry M. Garsson.

You will be given the indictment to take with you, and you will notice that in it there are four counts. The counts, as I am sure you have already been told in the past, by me, means charges. Each count is a separate charge.

One of them, as you have been told, Count 2, is out of the case, so don't take the time to read it even. Count 2 and Count 3 charge precisely the same offense; except for technical reasons they were couched in somewhat different language, and the Government has elected to submit the third count to you rather than the second.

I shall address myself first to the third and fourth counts of the indictment, and then come back to Count One, solely for the reason that I have a little bit more to say about Count One than I have about the other two.

Count 3 and Count 4, as well, charge violations of a Federal law, which I will read to you and tell you what the Government charges with respect to it.

That law, so far as applicable here, reads as follows:

> "Whoever, being elected or appointed a Member of Congress, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, shall directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation or arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or national commission whatever, shall be punished."

That is the language of the statute which the indictment charges was violated specifically, in Counts three and four.

Those two counts, each of them charge in substance that Congressman May, being a Congressman at the time, did receive compensation for services rendered or to be ren-

dered to the defendants, Henry M. Garsson and Murray W. Garsson; and it also names Joseph F. Freeman, who, as you know, is no longer in the case.

That is the offense which this statute announces.

They also charged in each of those counts that the defendants, Henry Garsson and Murray Garsson, while themselves incapable since they were not members of Congress and didn't receive compensation, but that they nevertheless are guilty with Congressman May, as principals, because by giving him the alleged compensation they thereby aided and abetted him in the alleged violation of this Section 203, Title 18, of the Code, which I have just read to you.

In that respect another section of the Criminal Code provides that whoever aids, abets, counsels, commands, induces or procures the commission of an offense defined in any law of the United States, is a principal. That is just as much so as in this case the Congressman himself, if he were guilty.

So that they charge in the third and fourth counts a joint offense by these three remaining defendants.

You could not find that either Henry Garsson or Murray Garsson were guilty unless you also found that Congressman May is guilty. That is so as to each of those two counts. That is so, as a matter of fact while I think of it, of all three counts in the case. I forgot to tell you that when I came back to number one.

Mr. May, if he is guilty at all, is in each one of these three counts, and you couldn't find under either one of these three counts either or both of the other defendants guilty and Congressman May not guilty. You could not do that.

You could find that Congressman May and either one or both of the other two defendants were guilty. You could find one of them not guilty and the other guilty, but in no case could you acquit the defendant May and convict either or both of the other defendants.

I granted defendants' request for instruction concerning Count 3 in the indictment, which I have somewhat changed, and I will also read that to you:

Count 3 of the indictment charges the receipt of a check of the sum of $5000 by the defendants, Henry M. Garsson

and Murray W. Garsson, and Erie Basin Metal Products, Inc., to Andrew J. May.

In this connection, in order to establish the offense charged in Count 3 of the indictment, you must find beyond a reasonable doubt from the evidence that payment was made directly or indirectly by check of the Erie Basin Metal Products, Inc., of the value of $5,000, by the defendants, Henry M. Garsson and Murray W. Garsson to Andrew J. May in return for the rendition of services by Mr. May. The evidence of the Government must conform to this allegation.

If you find from the evidence with respect to Count 3 that the Government has failed to prove the payment in the sum of $5,000 to the defendant May for compensation, or that the evidence on this aspect of the case is evenly balanced, as I told you a bit ago, or that the evidence on this aspect of the case does not convince you beyond a reasonable doubt of the evidence of such a payment, then you must return a verdict of "not guilty" as to all the defendants on the third count.

With respect to the fourth count I granted the defense request for instruction, which I will read also:

Count 4 of the indictment charges the agreement to receive, directly or indirectly, by Andrew J. May, from Henry M. Garsson, Murray Garsson, Erie Basin Metal Products, Inc., and Batavia Metal Products, Inc., compensation for services rendered and to be rendered by Andrew J. May to Henry M. Garsson, Murray W. Garsson and the corporations, in the sum of $15,477.60 from Batavia Metal Products, Inc., and the sum of $38,156.47 from Erie Basin Metal Products, Inc.

In this connection, in order to establish the offense charged in Count 4 of the indictment, you must find beyond a reasonable doubt from the evidence that there was in existence an agreement to receive, directly or indirectly, the sum of $15,477.60 from Batavia Metal Products, Inc., and the sum of $38,156.47 from Erie Basin Metal Products, Inc., by Andrew J. May in return for the rendition of services by Andrew J. May to Henry M. Garsson, Murray W. Garsson, Erie Basin Metal Products, Inc., and Batavia Metal Products, Inc.

The evidence of the Government must conform to this allegation. If you find from the evidence that the Government has failed to prove the agreement to receive, directly or indirectly, the aforementioned sums by Congressman May for the rendition of his services as aforesaid, or that the evidence on this aspect of the case is evenly balanced, or that the evidence on this aspect of the case does not convince you beyond a reasonable doubt of the existence of such an agreement, then you must return a verdict of "not guilty" as to all of the defendants on that count.

There is one modification of that instruction that I will make, and that is that it is not necessary to prove those two amounts down to the exact penny. The proof must be substantially near those two named amounts. It doesn't have to be established by the Government to the exact penny.

I think that, for the moment, is sufficient with respect to those counts.

The first count of this indictment charges a conspiracy by these three defendants, and also by Joseph Freeman, to do two things: To violate a law, to commit an offense against the United States and to defraud the United States. The statute under which that count is laid is a simple one and I will read that to you:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished."

You will note that the elements of this crime of conspiracy are three:

(1) A conspiracy by two or more persons.

(2) The purpose of the conspiracy must be to commit an offense against the United States or to defraud the United States in any manner or for any purpose.

(3) Some act must be committed by one or more of the people charged to effect, that is, to bring about, the object of that unlawful agreement.

I will discuss those three elements.

First, as to the meaning of conspiracy. It implies, of course, an agreement of two or more people in the meeting of their minds in a common purpose to accomplish or carry out some act. In this sense a conspiracy may be either entirely lawful or it may be unlawful. But an unlawful conspiracy, which is what is charged by the first count of the indictment, means an agreement of two or more persons to do something that is in itself unlawful, or to do some act which may be lawful but to do it by means which are unlawful, or for a purpose which is unlawful.

And what the Government by this indictment charges in the first count is that these defendants agreed with each other that Congressman May would receive compensation for services rendered and to be rendered by him on behalf of these individuals and the Erie Basin Metal Products Company and the Batavia Metal Products Company. That is the gist of the charge in that first count.

With respect to the second element: The conspiracy must have for its purpose, the agreement must have, the unlawful agreement must have the purpose either to commit an offense against the United States or to defraud the United States.

The word "offense" against the United States as here used has been legally held to mean to violate some criminal statute of the United States.

As applied to this case it is the contention of the Government that the criminal statute, which it was the object of the alleged conspiracy to violate, was this Section 203 of Title 18 which I read to you a few moments ago, which makes it an offense for a Congressman to receive compensation in respect of a matter concerning which the Government is interested.

The Government also contends that the conspiracy in this case was to defraud the United States, as prohibited by the conspiracy statute which I read to you.

You will note the language of that statute forbids an illegal agreement to defraud the United States in any manner or for any purpose. It has been legally decided by the Courts that this phrase "defraud the United States in any manner or for any purpose" is not limited merely to con-

spiracies to deprive the United States of money or property or other things of pecuniary value.

It also comprehends the right of the Government not to be defrauded of the unbiased, independent, faithful, loyal services of its employees, including Congressmen.

And so the allegation, and it is spelled out in the indictment at lengths to which it is unnecessary for me to go, is in that regard that these defendants, including Mr. May, got together and agreed to defraud the Government of his independent, honest, unbiased, unprejudiced, faithful, loyal services as a Congressman.

I should say this with respect to both phases of the statute which has to do with a conspiracy and agreement to commit an offense, the alleged agreement to defraud the United States:

I don't mean to say that it is necessary for the Government to establish that the defendants got together and said, "Let's violate, let's agree together to violate Section 203 of Title 18 of the United States Code."

Or, that they got together and said, "Let's agree to defraud the United States out of your faithful, independent, loyal," and so forth "services."

If they agreed to give him money as compensation, and if he agreed, if it was even implicit in it, if he intended and they knew it and he knew it, if he intended by virtue of that compensation to perform services such as have been alleged and I have described in the indictment, that constitutes the kind of an agreement that the law has in mind and makes illegal.

The third necessary element of the crime charged against these defendants is that the alleged agreement is not deemed to have been completed unless and until one of the parties, one or more of the parties, to the agreement shall do an act to effect and carry out the object of the agreement.

You cannot commit the attempt to commit a particular crime unless you do some act to carry out the intent which has been formed specifically.

That is true here. The Congress has not made it a Federal offense to sit down and agree to violate the law or to defraud the United States alone. The offense is complete only when one or more of the parties in agreement do something to

try to bring it about. And those acts are known as and they are described among others in the indictment as overt acts. There are some thirty or more, I think, set out in the indictment as being so-called overt acts which were designed to bring about this agreement.

The act which is done does not have to accomplish the final and ultimate result desired, nor does it have to be itself an unlawful thing, but it has to be something done physically and outwardly to tend to put into effect or to definitely manifest what was the purpose of the alleged agreement.

The word "overt" in this sense has the sense of an open act, and the indictment specifies a number of them. It means some physical action done for the purpose of carrying out or effecting the object of the conspiracy.

I think I have said this to you: It is not necessary to the offense that those acts or any one of them shall themselves be unlawful. It is sufficient, even if entirely lawful, provided it is done to effect the object of the agreement. Nor is it necessary in this case for the Government to prove all of the separate overt acts which they have set out in the indictment; it is sufficient if the Government proves any one of them.

Now, I point out again that it is not necessary to the establishment of the charge of the unlawful conspiracy and agreement that the object of the conspiracy should in fact be actually accomplished. The essence of the crime of conspiracy is the unlawful agreement to accomplish an unlawful act and the charge is not that the unlawful act was in fact accomplished. It is the agreement, that is, the meeting of the minds, of two or more persons, to accomplish the purpose, followed by some act for the purpose of accomplishing it, although the purpose is not accomplished, that constitutes the crime.

Now, you may, in considering whether there was an illegal agreement, take into account, and give such weight to them as you think they are entitled, the various alleged overt acts, if you believe any of them were done at all, in determining whether those very acts indicate the pre-existing agreement.

If you find the conspiracy as alleged and also find that these defendants were parties to it, then it is the law that the acts and declarations of any one of them in carrying out

the illicit agreement are admissible against and binding upon the others. But of course acts and statements of parties whom you may find were parties to the agreement are in no way binding upon other people whom you do not find were members of the conspiracy.

It is, therefore, necessary and important for you to carefully consider the whole testimony in the case with respect to each of the defendants on trial separately to determine whether he was a member, a party to this alleged illegal agreement and, therefore, whether any acts or statements of the others are binding upon each, each has the right to be tried as if he alone were on trial.

Now, I want to say a word about circumstantial evidence. There is quite a bit of testimony in this case that may be regarded as circumstantial, as distinguished from direct evidence. Direct evidence is where a witness says: I saw this, that or the other thing, and I know it personally; I was there or I heard it.

Circumstantial evidence is where you undertake to prove a fact as a deduction or inference from some other fact. There is a great deal of conflict, and always has been, as to the relative value of direct and circumstantial evidence. So far as the law is concerned, you can prove a case either by direct or circumstantial evidence.

Circumstantial evidence is that character of evidence which tends to prove a disputed fact by proof of other facts which has a legitimate tendency to lead the mind to a conclusion that a fact exists which is sought to be established. This is legal evidence and a jury must act upon it as if it were direct when it is satisfied beyond a reasonable doubt but to the extent that the government's proof in the case is circumstantial, those circumstances relied upon must be consistent with the guilt alone and not the balanced hypothesis of either guilt or innocence as I have told you.

There are a number of other requests that the defendants have made, and the government as well, some of which I will read to you or discuss. I think perhaps I have covered them pretty generally.

You must not draw any inference of guilt as to one or more of the defendants merely because all defendants are indicted and being tried together. I have told you that they

have the right to be tried as if they were separate and I will also say to you before you can find a verdict of guilty under the indictment, you must find it was one general agreement, not a series of different agreements.

The government says it was one agreement to do two things: Violate a law—that is, to give a Congressman compensation and the law says he cannot take it and the other one was to defraud the United States. The result of giving it to him would be that the government does not get the independent, impartial and unbiased services of a Congressman.

Mere association is not sufficient to warrant a verdict of guilty.

I was also asked to tell you, and I do, that Congressman May had a right, as any member of Congress would have, and that he, as Chairman of the House Military Affairs Committee had to make inquiries of various officers and agencies and to inquire about situations pertinent to the position and his duties as a member of the House Military Affairs Committee and so forth. None of that. I do not think, at the moment, of any single overt act alleged or proved which, in itself, was a thing that either by law or otherwise, he did not have a right to do; for instance, specifically telephoning Secretary Patterson, General Campbell. There is nothing illegal about that, in itself. What is illegal about it, if anything, is whether he did it for compensation. That is all.

That is why I told you earlier, really, that this case is as simple a case as you will ever be called upon to hear so far as the issue is concerned. That is all there is to it. He had a right to be in business. He had a right to be in the Cumberland Lumber Company. He had a right to do all these things. In and of themselves there is nothing wrong with them but they are all wrong if he did it for compensation and the government would only have to satisfy you that he did one of those things if you believe there was this illegal agreement. It isn't necessary to prove them all.

I am specifically asked to read this which I will do. It is pretty much what I have already said but I am asked to say this to you and I will.

The mere receipt of funds or moneys by Andrew J. May from either Erie Basin Metal Products, Inc., Batavia Metal Products, Inc., or Henry Garsson or Murray Garsson or any other person in behalf of the Cumberland Lumber Company did not of itself, standing alone, without more, constitute an unlawful act or conspiracy as charged in this indictment. That is all true. You consider those things together with all the other evidence in determining whether there was this unlawful agreement and whether compensation was paid to Mr. May while a member of Congress.

The same is true with respect to the fact that Congressman May acted as process agent. I am asked to call that to your attention and I do. Process agent for Cumberland Lumber Company in Kentucky—that means that every corporation formed out of a state must have what is called a process agent within the state so that, if somebody within the state wants to sue the corporation, there is a man there through whom it can be done by just serving a paper on him. There is nothing illegal or unlawful about that, in and of itself. It is one of those things you take into consideration, with all the other evidence, in determining whether it was done for compensation or whether it indicated he was the real owner of Cumberland Lumber Company, whether this was this agreement and so on.

The government has asked me in several requests to charge you also, one of which I have granted. That, gentlemen, for your information is Government's No. 12. I will read this as given to me.

If you believe that the defendants conspired to defraud the United States, or to violate Section 203 of Title 18, United States Code, as alleged in the indictment, and committed one or more of the overt acts to effect the object of the conspiracy, and if you further believe that the defendants violated Section 203 of Title 18, United States Code, as alleged in the third and fourth counts of the indictment,—if you believe that beyond a reasonable doubt, as I have defined the meaning of that,—you should convict the defendants, irrespective of what your conclusion may be as to the merits of the matters and things concerning which Mr. May contacted the War Department, and irrespective of what you believe as to the contributions, if any, of the defend-

ants, Henry Garsson and Murray Garsson, Erie Basin or Batavia, to the war effort.

For the Court charges you that the law is that if a member of Congress receives compensation, directly or indirectly, for services rendered or to be rendered to any person in any matter, in which the United States is directly or indirectly interested, before a government department, it is immaterial whether the matter pending before the department should or should not be decided favorably to the person in whose interest the congressman rendered or attempted to render services.

Likewise it is immaterial in this case whether or not the contracting corporations were good producers or bad producers, whether or not the "E" awards were merited or unmerited, whether or not the so-called freeze order should or should not have been entered in the first place or should or should not have been rescinded in whole or in part, whether or not Erie Basin or Batavia were improperly or properly restricted in manpower by the Manpower Commission, whether or not the corporations and their officers were discriminated against, whether or not the requests of the War Department in relation to personnel matters, if you believe such requests were made, were justifiable or not, whether or not Henry Garsson was an inventor of manufacturing processes or not, and whether or not the other matters and things testified about were properly or improperly decided by the officials of the War Department.

It was for these reasons that the Court restricted corroboration offered by the defendants and declined to permit the government to introduce evidence in rebuttal as to the facts concerning those various matters.

The Court charges you that in determining whether or not the defendants are guilty as charged in the several counts of the indictment, you should weigh and consider the testimony of Andrew J. May and Henry Garsson as to the motives they assigned for their action in contacting the War Department and causing Mr. May to contact the War Department as disclosed by the testimony in the case, and although it was probably made plain to you during the course of the trial, those are the reasons why that

evidence was offered and why it was limited in one sense on the part of the defendants and why the government was not permitted by the Court to introduce any evidence concerning it.

Its only competency in this case, those various things I have just gotten through talking about when I read the government's instruction, are competent only in order for you to determine whether you believe they were true at all, and if so, whether they or any one of them, all of them or any one of those various matters motivated Henry M. Garsson or Murray Garsson or their representative, Freeman, to go to May to get his help and if you believe that did occur and those situations were as represented by the defendants on the witness stand, and *if you believe* that that is what motivated them to go to Congressman May, then you will decide in your mind whether or not it had any effect, as he said it did, on him; any effect in the sense that it is what caused him, rather than compensation that he received, to make these contacts with the War Department and Manpower Commission and so forth and it is to be given no other consideration by you.

That is one of the things I had in mind when I said to you earlier that this case calls for a high degree of objectivity. It really does. That is one of the things about which you must be objective. It does not matter one iota except in respect of the thing I have just been talking about, whether the Garssons or those companies were the best producers in the land of munitions of war, or the worst; whether the War Department was *terribly* right or *terribly* wrong in any of the various controversies they said they had. It makes no difference in this case. It should not be permitted by you to affect your judgment at all except only if you believe that they were so and if you believe that is what caused the Garssons to go to May for help and if you believe that is why May gave them the help rather than for compensation.

Another thing that is immaterial is whether or not Congressman May made any money out of the Cumberland Lumber Company or he did not. The question is: Was it a vehicle and a medium by which he could receive some com-

pensation? If it was, then if he lost all the money given to him to put into it plus more of his own, it wouldn't make any difference in the world. Why was he in it? Was he in it as he tells you or was he in it as the government tells you? Look to the evidence for the purpose and the real reason for May's interest and by "interest in," I mean activity on behalf of the Cumberland Lumber Company but it doesn't make any difference and it makes no difference either, if those Cumberland moneys were received by May, it would make no difference that when the property was sold, all of it went back to the Garssons. That wouldn't make any difference either. It is what was the situation at the time the money was paid. Was it then paid as compensation for services either rendered or to be rendered in the future or was it, as the defendants say it was, the building of a new company in order to secure lumber which they needed and which was scarce?

Another thing I must comment upon—and I do not know how this got into the case any more. It is unfortunate that it did but it is in here and, therefore, I must talk to you about it briefly—suggestion has been made to you that the Mead Committee, Senator Mead and his Committee were motivated by political ambitions or for political reasons in making the investigation which that Committee did make—the Senate War Investigating Committee.

That calls for objectivity on your part. That has nothing to do whatever with this law suit. Even if the Mead Committee had set out with no purpose in mind other than the destruction of Congressman May for political reasons, it makes no difference. Why doesn't it make any difference? What counts is the evidence which you hear and the evidence which you have heard. That is what matters. That is all that matters. Not what the evidence was that the Mead Committee had.

You heard it here in the court room. You will decide where the truth of the matter lies. Don't let that affect you. Whether it is true or not, does not make any difference.

Another thing, there have been statements made that Congressman May never got a contract for the companies and that, as a matter of fact, he never really accomplished

anything for them. It does not make any difference whether he did or not, if his purpose in making the contacts was for compensation. That is all. We don't care whether he hit the mark or he missed it. It is whether he did it for that reason and that is the only thing you have got to decide.

One more thing and I think I am through except that I will ask you, when I conclude, to retire for a few minutes because I am sure the lawyers will either tell me I am wrong or I have forgotten something—and I usually do and they are usually right on one or the other of those points. It is this and nothing that I have thus far said is of greater importance.

You have been told by witnesses on the stand, Henry M. Garsson and Mr. May; it has been argued to you by Mr. Sawyer Smith and Mr. Perry Howard and Mr. Margiotti; that the defendants, the Garssons and Erie Basin and Batavia Companies, were discriminated against in the Chicago Ordance District because they were Jewish. Now, whether that is true or not, like these other things I have been talking about, is beside the point and it makes no difference except only, if you believe it was true and if you believe it motivated or was one of the things that motivated Henry or Murray Garsson or Freeman to go to May for his help and if you believe that it was one of the things that caused May to give his help and his services, then for that reason it is competent evidence.

It is limited to that but if anyone of you let the fact that two of these defendants are Jews influence you against them or for them, you will bring dishonor upon yourself and you will bring dishonor upon this Court. So remember that and I think you will have no trouble with that. Don't let yourselves stoop to a consideration as ugly and as foreign to this case except insofar as the limit of its area of admissibility and competency is which I have already described.

Now, gentlemen, I have run out but I am sure you haven't.

I will ask the jury to step out to the jury room for a few moments.

(Thereupon, the jury retired to the jury room at 4:28 o'clock p. m.)

* * * * * * *

(Thereupon, the jury returned to the courtroom at 5:15 o'clock p. m.)

The Court: Ladies and gentlemen, some things have been called to my attention and there were two instructions that I had said I would grant for the defendants and I can't remember whether I did or if I did whether I did it as I intended to. I think they were adequately covered but the first one of them is this:

Conviction cannot be had in this case on suspicion no matter however strong.

The other one is:

The jury must not speculate or guess on the guilt of any of the defendants.

It is thought possible that when I discussed with you the evidence which had to do with the sending of the proceeds from the sale of the Cumberland Lumber Company tract back to the Garssons or the companies, or both, that I may have misled you and it is possible that I did. If I said so, I didn't mean it, that that has nothing to do with the case. If it hadn't anything to do with it, I would have stricken it out of the evidence long since. Of course, it was admissible on the question of who owned the Cumberland Lumber Company.

I am sure you must have understood that. I wasn't telling you to take it out of the case. It is in for that purpose with whatever weight you want to give to it, either as proof that the Cumberland Lumber Company was owned by the defendant, Henry Garsson, or that it wasn't. You give it what weight you think it is entitled to, along with the other evidence, but it is definitely in the case on that question.

This I have neglected to say but I have told you so many times, I guess, I just forgot it in this case.

You know, of course, that you are the sole judges of the evidence in the case but that you must take the law as given you by the Court and it is very important for you not to try to determine from anything I may have said or the way I

may have said it what my opinion of the evidence is. Don't speculate on that any more than you speculate on anything else because, even if I had an idea and had given an impression, it is not my business, so don't let that fact, if you think there was any, by any chance, such impression given you, don't let it interfere or influence you or affect your thinking and voting in the slightest degree.

I think I also made this clear but I may not have and, just in case, I will repeat it.

In discussing the possible verdicts in the case, there are three counts in the case, as I have told you, and the verdicts on all three of them, the possible verdicts on all three counts are—not guilty as to all defendants, each defendant on each of the three counts; guilty as to each defendant on all three counts and, as to Count 1, there is a further possible verdict and this is true as to Counts 3 and 4 also. The other possible verdict is guilty as to one of the Garssons and not guilty as to the other Garrson and that is so in Counts 1, 3 and 4, but in no case in any of the counts, could you find either or both of the Garssons guilty and the Defendant, May, not guilty. In other words, if you find either of them guilty, you can only do so by also finding Congressman May guilty.

That covers them all, doesn't it?

Mr. Margiotti: I think you had covered it before.

The Court: I think so too.

Mr. Magee: A finding as to Congressman May's honesty ends the case because there would be no one else guilty as to these offenses, as I understand it.

The Court: That is right.

Mr. Magee: That ends the case.

The Court: That is right. I said that as clearly as I can imagine that it could be said.

Now, there is one other thing. I have come to the conclusion not to send into the jury room with you these exhibits, for these reasons: You then would have part but not all of the evidence in the case because you have got to depend on your recollection about the testimony that was given on the witness stand and I suppose every document that went in—definitely every document that went into evidence by either the Government or the defendants went in in the

context of testimony concerning that exhibit and, therefore, I think it is not right to let you have part of the evidence in the case when you cannot have it all so you will have to depend on your recollection about the entire case. But if you have any questions from time to time, you can write them out on a slip of paper, give them to the deputy marshal in charge who will give them to me and then I will take them up with counsel and see whether we can answer your question or not and I will tell you whether we can or not.

I have also concluded that it is not good to submit this case to you this evening at the end of a long day when, I am sure, you must be as weary as the lawyers and the reporters and the Judge,—I am sure the Clerk isn't weary. So I am going to let you go home and report tomorrow morning, and that includes you two alternate jurors. You will report tomorrow morning to the jury room that you have been using. Be there at nine o'clock in the morning. Don't discuss the case tonight with anybody under any circumstances, including yourselves. Don't discuss it tomorrow morning until—first I will have to bring you in in the morning and let the two alternate jurors go.

When the twelve of you are finally in the jury room, your first task, as you already know, is to select your foreman and then remember this that I have also told you from time to time: Proceed with some degree of formality but not too much of that, one extreme is as bad as the other, but don't let yourselves at any time get in the position where everybody is talking and nobody is listening; so (take it easy and you won't have any difficulty, I don't suppose.)

Be very careful tonight not to read the papers or to listen to the radio or talk with anybody about the matter and don't talk in the morning about it when you get together in there until you are finally there for the purpose of deliberating.

(Record of proceedings in the United States District Court for the District of Columbia, Volume #47, pages 6946 through 6989 and 7008 through 7013).

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 100

ANDREW J. MAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 101

MURRAY W. GARSSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 102

HENRY M. GARSSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 159-176)[1] and dissenting (R. 176-187) opinions in the Court of Appeals have not yet been reported.

[1] "R." will be used herein to refer to the printed record, consisting of excerpts from the typewritten transcript of record on appeal, plus the proceedings in the Court of Appeals. References to the original typewritten transcript of record will be indicated by "Tr."

JURISDICTION

The judgments of the Court of Appeals were entered January 24, 1949 (R. 188), and petitions for rehearing were denied April 6, 1949 (R. 189-190). By orders dated April 20, 1949, and April 25, 1949, petitioners' time for filing petitions for writs of certiorari was extended by Mr. Justice Black to and including June 4, 1949 (R. 193-194), and the petitions were filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether a count charging conspiracy (1) to violate 18 U.S.C. [1940 ed.] 203 (making it unlawful for a member of Congress to accept compensation for services rendered in any matter in which the United States is interested) and (2) to defraud the United States, *inter alia,* of its right to the faithful and unbiased services of the member of Congress, is duplicitous.

2. Whether a count charging the receiver and the giver of the compensation, the receipt of which is proscribed by 18 U.S.C. [1940 ed.] 203, with conspiring to violate that statute is defective on the ground that the substantive offense itself necessarily requires "concert of action and agreement between the receiver and the giver"; and

whether, even if so, the point is material in this case in view of the fact that petitioners' sentences on the conspiracy count run concurrently with their sentences on the substantive counts.

3. Whether the one who gives the compensation, the receipt of which is made an offense by 18 U.S.C. [1940 ed.] 203, can properly be convicted of aiding and abetting the receipt.

4. Whether the evidence is sufficient to sustain the convictions.

5. Whether petitioners May and Henry Garsson obtained immunity from prosecution by virtue of their having testified before the Senate War Investigating Committee, prior to their indictment, concerning matters relating to the facts in this case.

6. Whether government exhibit 179, a stenographer's notebook, was unlawfully seized from petitioner Henry Garsson and erroneously received in evidence against him.

STATUTE INVOLVED

18 U. S. C. [1940 ed.] 203 provided in pertinent part:

> Whoever, being elected or appointed a * * * Member of * * * Congress, * * * shall, * * * during his continuance in office, * * * directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy,

charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

STATEMENT

Count 1 of a 4-count indictment (R. 2-17) filed in the District Court for the District of Columbia charged petitioners and one Freeman with having conspired, in violation of Section 37 of the Criminal Code (18 U. S. C. [1940 ed.] 88), "to commit offenses against the United States, that is, to violate Section 203 of Title 18 of the United States Code [*supra*], and to defraud the United States" (R. 2). The nature of the alleged conspiracy and the manner in which it was carried out were set forth in detail (R. 3-7) and 35 overt acts were alleged (R. 7-12). Count 3[2] charged petitioner May with having received a check for $5,000, in violation of 18 U. S. C. [1940 ed.] 203, *supra* (R. 14-15). Count 4 charged petitioner May with having agreed to receive sums of money totalling $53,634.07, in violation of the same statute (R. 15-

[2] Count 2 was identical with Count 3, except that the $5,000 involved therein was alleged in the former count to have been received in cash (R. 12-14). The Government elected to stand on the third count and abandon the second, as to which, accordingly, petitioners were granted motions for judgments of acquittal (R. 160).

17). Freeman and the petitioners Garsson were charged as aiders and abettors of May in counts 3 and 4 (R. 15, 16-17). Following a trial by jury, petitioners were found guilty on all three of the above counts and each was sentenced to imprisonment for from 8 months to 2 years on each count, the sentences to run concurrently (R. 151-153). Freeman was granted a judgment of acquittal on all counts (R. 160). On appeal to the Court of Appeals for the District of Columbia Circuit, petitioners' convictions were affirmed, one judge dissenting (R. 188).

The evidence adduced by the Government may be summarized as follows:

1. Petitioner Andrew J. May, throughout the period covered by the indictment (1942-1946), was a member of the House of Representatives and Chairman of the House Military Affairs Committee (Tr. 2343). Petitioner Henry Garsson was an officer and director of, and substantial shareholder in, two corporations, Erie Basin Metal Products, Inc., and Batavia Metal Products, Inc. (hereafter referred to as "Erie" and "Batavia," respectively) (Tr. 3641-3644). Petitioner Murray Garsson (Henry's brother) was an officer and director of both corporations (Tr. 810, 5853) and was also their Washington representative (Tr. 4473, 5228). The defendant Freeman was an assistant to Murray Garsson in his latter capacity (Tr. 5227-5228, 5246). Henry Garsson received annual salaries totalling $90,000 from Erie, Batavia, and a

subsidiary of the latter (Tr. 5072-5073). Murray Garsson received annual salaries totalling $55,000 from Erie and Batavia (Tr. 5011-5012). These two companies obtained approximately $78,000,000 in contracts from the War Department during the war (Tr. 3914).

May met Murray Garsson in 1941 (Tr. 2876), and they became close friends, addressing each other by their first names (G. Ex. 178, Tr. 3255). Murray Garsson and Freeman were often in May's office (Tr. 1082, 1693). May met Henry Garsson in 1942 (Tr. 3661), and in conversations with army officers May referred to Henry Garsson as his friend (G. Ex. 140, Tr. 1558; Tr. 1439, 1453).

2. *May's services to the Garssons and their corporations.*—Commencing in 1942 and continuing throughout the war, May intervened with the War Department many times, by letters, telephone calls and personal interviews, on behalf of the Garssons and their two corporations, Erie and Batavia. The evidence showed that May was constantly bringing pressure to bear on officials in the War Department to give war contracts to these companies (e.g., Tr. 1385-1389, 1439, 1479-1480, 1559-1560, 1579, 1784-1785, 1807-1809), protesting contract cancellations, terminations, and cut-backs (e.g., Tr. 1212-1214, 1220, 1229, 1259-1260, 1265, 1284, 1378-1381, 1417-1419, 1464-1467, 1558-1559, 2018-2019, 2136), interceding on behalf of the corporations in manpower disputes (Tr. 1583-1585, 1597-

1598, 1601, 1646, 1666, 1669-1671, 1794-1795, 1801), and the like.

In addition to his services on behalf of the corporations, the evidence showed that May interceded with the War Department and General Eisenhower in connection with a pending court-martial trial of Murray Garsson's son Joseph (Tr. 1702-1703, 1814-1815, 2058-2061); attempted to procure, on behalf of Freeman's son Albert, a furlough to this country from his overseas station (Tr. 1699, 1763, 2167-2168, 2172-2173); summoned a certain army officer to his, May's, office on numerous occasions to discuss with Murray Garsson and Freeman matters involving the transfer, promotion, and assignment of military personnel in whom they were interested (Tr. 1693-1694, 1698, 1738); interceded with Under Secretary of War Patterson in an effort to procure a commission for one Schwamm, a person in whom Murray Garsson was interested (Tr. 1919-1922, 1999-2001, 2022), etc.

3. *Evidence of May's ownership of the Cumberland Lumber Company.*—(a) In April 1943, May mentioned to Leroy Fields, Sr., a lifelong friend and constituent (Tr. 380, 385), that he "was interested in finding a good timber proposition" (Tr. 385). Fields advised May that a certain 2,200-acre tract in Letcher County, Kentucky, which was owned by the Mineral Development Company, could be purchased at $10 an acre (Tr. 386, 395). May told Fields that he had the backing of "big financial interests" from whom he could obtain the

necessary funds (Tr. 386, 567). They agreed that May would obtain the necessary capital for the purchase of this tract (Tr. 388); that a corporation would be organized, the stock of which would be owned equally by them (Tr. 388, 394, 395); and that Fields would manage the property (Tr. 411, 412).

On May 7, 1943, Mineral Development granted an option, covering the land in question, to May (G. Ex. 82, Tr. 1871; Tr. 1878). The option provided for the payment of $1,000 to Mineral Development at the time of execution (*ibid.*). On May 11, 1943, May transmitted to Mineral Development a cashier's check in the amount of $1,000 (G. Ex. 162, Tr. 1857; Tr. 1883). This check had been issued to one Raynes, who purchased the check at Murray Garsson's request and turned it over to the latter (Tr. 1909; G. Exs. 161-163, Tr. 1857). Mineral Development prepared a deed to the property, naming May as grantee, and sent May a copy for his approval (Tr. 2647-2648). At May's request, the grantee was changed to Cumberland Lumber Company, to which May said he was assigning the option (D. Ex. 67, Tr. 2647; Tr. 1876, 1982, 1983).

The purchase price of the land was $21,044.40. Henry Garsson delivered to Mineral Development a cashier's check in the amount of $10,044.40 as the second payment (G. Ex. 19, Tr. 189; Tr. 3685). To cover the $10,000 balance, four promissory notes of Cumberland Lumber Company, signed by Henry

Garsson as "President," each dated July 30, 1943, and in the amount of $2,500, were delivered to Mineral Development (D. Exs. 16, 59-61, Tr. 1965-1967).

(b) The Cumberland Lumber Company was incorporated on June 15, 1943 (G. Ex. 85, Tr. 2177; G. Ex. 170, Tr. 2211) and qualified to do business in Kentucky on August 5, 1943 (G. Ex. 86, Tr. 1096), May being designated as resident agent (G. Ex. 170, Tr. 2211). The corporation was organized by the Corporation Trust Company at the request of one Levin, a Washington attorney, deceased at the time of the trial (Tr. 1091, 1092). On June 15, 1943, Murray Garsson, Freeman, and Levin were named directors, but no stock was issued (Tr. 1094). On January 26, 1945 (G. Ex. 87, Tr. 1098) and again on March 1, 1945 (G. Ex. 88, Tr. 1099), the Corporation Trust Company wrote May for payment of its annual fee from Cumberland Lumber Company, stating in each letter that it had been informed by Levin that he, May, was the "only person interested in maintaining the life of this Corporation." May did not reply to either letter (Tr. 1098), but sent his personal check in payment of the fee on July 2, 1945 (G. Ex. 90, Tr. 1103).

(c) Contrary to the understanding reached with May, Fields never received any stock in the Cumberland Lumber Company. He continued to manage the timber project on a salary basis, however, until March 13, 1944, when May discharged him (G. Ex. 59, Tr. 485; Tr. 415, 488). During this

period, May wrote numerous letters to Fields concerning the affairs of the company and covering such subjects as the purchase of a mill (G. Ex. 37, Tr. 398; G. Ex. 41, Tr. 433; G. Ex. 43, Tr. 437), the location of a mill site (G. Ex. 38, Tr. 402; G. Ex. 51, Tr. 458), the cutting of mine timber (G. Ex. 43, Tr. 437; G. Ex. 44, Tr. 440), the construction of a log chute (G. Ex. 45, Tr. 442, 444, 445; G. Ex. 46, Tr. 445), etc. In various letters May urged Fields to sell certain timber while the price was high (G. Ex. 38, Tr. 402; G. Ex. 39, Tr. 408). In November 1943, May forwarded a letter which he had received from a certain company offering to purchase 200,000 feet of lumber at certain prices (Tr. 457), with the comment that the prices offered did not seem high enough (G. Ex. 50, Tr. 456). But in no instance did May ever instruct Fields to cut lumber for Erie or Batavia (Tr. 406, 407, 434).

May's son succeeded Fields as manager of the project until the former's death in June 1944 (Tr. 620, 637, 638). Then May's nephew, known as "Little Jack," was appointed manager by May on a salary basis (Tr. 606). He served in that capacity until December 1944 (Tr. 607). Lumber was sold during this period (Tr. 618), but at no time did "Little Jack" receive instructions from May to sell or store lumber for Erie or Batavia (Tr. 615, 618).

(d) On April 1, 1945, May and one Brown entered into an agreement whereby Brown would purchase the entire timber project from May for

$32,500, $5,000 to be paid on July 1, 1945, and the balance at the rate of $7 per thousand feet of timber manufactured (Tr. 658).[3] Pursuant to this agreement, Brown entered on the tract and expended considerable of his own funds for operations and equipment (Tr. 670-671). On May 25, 1945, however, May wrote Brown that he had conferred with "his associates" and that they had decided not to sell since they were users of large quantities of lumber (G. Ex. 64, Tr. 671). Previous to this, May had never informed Brown that any one other than himself had an interest in the property (Tr. 667, 668), and had dealt with Brown as if he, May, had been the sole owner (Tr. 669). Brown then demanded that May settle with him in regard to the $4,000 to $5,000 he had spent out of his own funds and take back the property (Tr. 674). May, however, told Brown to remain on the property, as he thought they could arrive at a satisfactory agreement (*ibid.*). Brown stayed on, cutting and selling lumber (Tr. 678). He did not store any lumber for Erie or Batavia (Tr. 679), however, nor did May ever mention those companies to him or any purchase orders from them (Tr. 673).

In the fall of 1945, one Burns offered May $50,000 for the property, which May was willing to accept (Tr. 691-692, 697). Brown, however,

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[3] On April 24, 1945, May wrote Franklin & Co., one of his lumber customers, that "I have sold the property which I owned on Cumberland River in Letcher County, Kentucky, and the new owner will take possession shortly" (G. Ex. 101, Tr. 649).

claimed an interest in the property by virtue of his previous agreements with May and his capital outlays, and May was unwilling to meet the figure Brown demanded by way of settlement (Tr. 694-695). As a result, the sale to Burns was never consummated (Tr. 717). Cumberland Lumber Company brought an ejectment action against Brown in March, 1946 (D. Ex. 21, Tr. 2624). Brown and May appeared at the hearing (Tr. 700) and May offered to settle for $40,000 in cash, Brown to get clear title to the land and all equipment (Tr. 700, 784). Brown accepted the offer and delivered a $40,000 draft to May (Tr. 792).

4. *May's receipt of funds, through the Cumberland Lumber Company, from the Garssons and their corporations.*—(a) On July 8, 1943, Erie issued a check in the amount of $10,000 to Murray Garsson (G. Ex. 3, Tr. 820). This was a "loan" to Murray Garsson, for which he gave his promissory note. Henry Garsson endorsed Murray Garsson's name on this check, and, on July 19, 1943, used the proceeds thereof to purchase a $10,000 cashier's check (G. Ex. 17, Tr. 189; Tr. 185, 192). This cashier's check, payable to Murray Garsson, was used by May on July 26, 1943, to open an account in the First National Bank of Prestonburg, Kentucky, in the name of the Cumberland Lumber Company (G. Ex. 27, Tr. 203; G. Ex. 17, 21, Tr. 202). The check, which had been delivered to May by Murray Garsson (Tr. 2668), bore the endorsements of "Murray W. Garsson" and "Cumberland

Lumber Co.," the latter endorsement being in May's handwriting (Tr. 183, 203). May alone was authorized to draw on the account (Tr. 202). The bank officer who received the deposit asked May who the directors of the Cumberland Lumber Company were and was informed by May that there were none as the company was "merely incorporated" (Tr. 201). May also advised the officer that no stock had been issued, and from the conversation the officer understood that Cumberland was owned by May and his family (Tr. 201, 239).

(b) On July 31, 1943, Erie issued a check in the amount of $10,000 to Henry Garsson (G. Ex. 4, Tr. 820). This was a "loan" to Henry Garsson, for which he gave his promissory note. Henry Garsson used the proceeds of this check to purchase a cashier's check, dated August 6, 1943, payable to himself in the amount of $10,044.40 (G. Ex. 19, Tr. 189). This cashier's check was used to make the second payment (see p. 8, *supra*) to the Mineral Development Company for the purchase by May of the timber tract in Letcher County, Kentucky (Tr. 3685).[4]

[4] In addition to the two $10,000 loans described in (a) and (b), *supra*, Erie had loaned the Garssons each $5,000 in the previous month, June, 1943, issuing a $5,000 check, dated June 6, 1943, to Henry Garsson (G. Ex 1, Tr. 812) and another $5,000 check, dated June 7, 1943, to Murray Garsson (G. Ex. 2, Tr. 812). The four items, totalling $30,000, were carried by Erie on its books under a loan account until November 30, 1943, when they were charged as "an advance on materials due from Cumberland Lumber Co." (Tr. 820, 821). At the end of the company's 1944 fiscal year, the items were transferred to an inventory account (see pp. 17-18, *infra*) (Tr. 822).

(c) On January 27, 1944, Batavia issued a check in the amount of $5,000 to Cumberland Lumber Company (G. Ex. 8, Tr. 233), pursuant to the request of Henry Garsson, as "an advance on purchases" (Tr. 843). On February 2, 1944, May deposited this check in the Cumberland account in the First National Bank of Prestonburg, endorsing it "Cumberland Lumber Company" (G. Ex. 28, Tr. 233).

(d) On June 9, 1944, Batavia issued a check in the amount of $1,500 to the First National Bank of Batavia in payment of a draft in that amount drawn by May on Batavia in the name of the Cumberland Lumber Company (G. Ex. 9, Tr. 314; G. Ex. 11, Tr. 216). May himself received the proceeds of this draft (Tr. 214, 215). The Batavia comptroller was told by Henry Garsson to pay the draft as "it was an advance" to Cumberland for box lumber (Tr. 320-324).

(e) On July 3, 1944, Batavia issued a check in the amount of $2,500 to Cumberland Lumber Company (G. Ex. 12, Tr. 234) as an "advance on box lumber" (Tr. 326). On July 5, 1944, May deposited this check in the Cumberland account in the First National Bank of Prestonburg, endorsing it "Cumberland Lumber Company, A. J. May" (G. Ex. 29, Tr. 234).

(f) On August 18, 1944, Erie issued a check in the amount of $5,000 to Murray Garsson (G. Ex. 5, Tr. 359; Tr. 881, 882). This check, endorsed by

Murray Garsson and May, was cashed by May on August 22, 1944, and $4,000 of the proceeds was deposited in May's personal account in the National Bank of Washington, Washington, D. C. (G. Ex. 33, Tr. 359). Against this deposit May drew checks for personal expenses, including tuition, taxes, hotel rent, photographs, and association dues (Tr. 3021-3024). The total of these withdrawals was approximately $1,300 (Tr. 3024). In explanation, May testified that a few days after receiving the check in question he was asked by Levin, the attorney who incorporated the Cumberland Lumber Company (deceased at the time of the trial), to pay his fee and that he wanted it in cash (Tr. 2684); and that he gave $1,300 in cash, which he had in a lock box in his office, to Freeman to deliver to Levin (Tr. 2684, 3024). Freeman testified that he received the money from May and delivered it to Levin (Tr. 6010-6013). However, neither Levin's cash book (G. Ex. 187, Tr. 6222) nor his income tax return for 1944 (G. Ex. 186, Tr. 6244), which the Government introduced in evidence in rebuttal, reflected the receipt by Levin of such a fee.

It was the $5,000 check described in (f), *supra,* on which count 3 (R. 14-15) of the indictment was predicated.

(g) On November 18, 1944, Erie issued a check in the amount of $3,156.47 to Cumberland Lumber Company (G. Ex. 6, Tr. 222). On December 11, 1944, May deposited this check in his personal

checking account in the First National Bank of Prestonburg (G. Ex. 23, Tr. 222). This amount represented the difference between the total amount of certain invoices of Cumberland to Erie for alleged lumber purchases ($33,156.47) and the $30,000 originally carried by Erie as "loans" to the Garssons but later charged as "an advance on materials due from Cumberland Lumber Co." (see footnote 4, *supra,* p. 13) (Tr. 815-816). The invoices were marked "paid" following payment of this check (Tr. 815).

(h) On March 9, 1945, Batavia issued a check in the amount of $1,850 to Cumberland Lumber Company (G. Ex. 14, Tr. 224). On March 14, 1945, May deposited this check in his personal checking account in the First National Bank of Prestonburg (G. Ex. 24, Tr. 224). Against this deposit May drew checks for payment of sundry personal expenses, such as a department store bill, hotel bill, income taxes, etc. (Tr. 3014-3017).

(i) On July 2, 1945, Batavia issued a check in the amount of $4,627.60 to Cumberland Lumber Company (G. Ex. 15, Tr. 229). On July 7, 1945, May deposited this check in his personal account in the Prestonburg Bank (G. Ex. 25, Tr. 229). May also drew checks against this deposit for personal obligations (Tr. 3027-3028).

5. *The fictitious transactions of the Cumberland Lumber Company with the Garssons' corporations.*

(a) *Erie.*—On October 29, 1943, Erie issued its

purchase order No. 7117 to the Cumberland Lumber Company for designated quantities of box lumber (G. Ex. 103, Tr. 824). The order contained the following statement: "The $30,000 paid you [see *supra,* pp. 12-13, and footnote 4] shall be considered an advance payment against this order and lumber shall be stored for our account until dry and pending shipping instructions." At the time of the issuance of this order, the mill on the Cumberland timber tract had not yet been erected (Tr. 458). Neither Fields, who managed the Cumberland project until March 1944 (*supra,* p. 9) nor May's nephew, "Little Jack," who managed it from June to December 1944 (*supra,* p. 10), ever saw this order (Tr. 437, 610). May himself testified he never saw it until the trial and knew nothing about it (Tr. 2845, 3116). Glick, an Erie official, was "certain" that the order was delivered to Henry Garsson rather than sent to Cumberland (Tr. 830). The Government introduced in evidence a purchase order from Erie to another company, bearing the same number and date as that issued to Cumberland (G. Ex. 104, Tr. 887), which the evidence showed was genuine and legitimate (Tr. 925-930).

The $30,000 in "loans" advanced to the Garssons by Erie in June and July 1943 (*supra,* pp. 12-13, and footnote 4) had, at the end of the fiscal year 1943, been charged on Erie's books as "advances" on purchases (Tr. 830). Glick, prior to the date of the 1944 closing of the books, inquired of Henry

Garsson several times whether the item should be treated in the books as in the previous fiscal year, or whether there would be an invoice and evidence of delivery of the material (Tr. 830). In November 1944, Henry Garsson delivered three invoices of Cumberland to Glick, stating that the lumber was being stored for Erie at Whitesburg, Kentucky (Tr. 816, 830, 831, 834). The invoices were dated October 11, October 23, and November 2, 1944 (G. Exs. 105-107, Tr. 825-827), and totalled $33,156.47. A check for $3,156.47 (balance above the $30,000 in "advances") was then made out (G. Ex. 6, Tr. 222) and was eventually received by May (see pp. 15-16, *supra*). The invoices were then marked "paid" (Tr. 815). No lumber, however, was ever delivered to Erie under these invoices (Tr. 825, 831).

(b) *Batavia.*—In February and March 1944, Batavia issued to Cumberland two purchase orders for lumber (G. Exs. 109, 110, Tr. 849). The Government introduced in evidence a Cumberland invoice to Batavia, dated March 29, 1945, in the amount of $10,850 (G. Ex. 108, Tr. 933). As of that date Batavia had made four "advances" to Cumberland, totalling $10,850 (G. Exs. 8, 9, 12, 14, Tr. 233, 314, 234, 224; see (c), (d), (e), and (h), *supra,* pp. 14, 16). In November 1945, O'Connor, a Batavia employee, was instructed by Henry Garsson to insert in Batavia's inventory book a sheet indicating that, as of April 30, 1945, there

was a lumber inventory of $10,850 (Tr. 939). Garsson told O'Connor that the purpose of this was to have "a page in there in the same handwriting as the rest of the inventory to show to the [Senate War Investigating] Committee" (Tr. 940). O'Connor did as instructed (G. Ex. 111A, Tr. 941). No lumber, however, was ever delivered to Batavia under this invoice (Tr. 1051, 1073).

ARGUMENT

1. Petitioners contend (May Pet. 34-35; Henry Garsson Pet. 47-51; Murray Garsson Pet. 14-15) that the conspiracy count is duplicitous because it charges that the object of the conspiracy was twofold, *i.e.,* to violate 18 U.S.C. [1940 ed.] 203 and to defraud the United States. We submit that the contention is without merit. "Countenance we believe has been given by some Courts to the notion that a single count in an indictment for conspiring to commit two offences is bad for duplicity. This Court has given it none. [Citing cases.] The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States,* 249 U.S. 204, 209-210; *Braverman* v. *United States,* 317 U.S. 49, 54; *Pinkerton* v. *United States,* 328 U.S. 640, 642-643; *United States* v. *Manton,* 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664.

This is not a case in which the substantive offense alleged to be an object of the conspiracy charged—for example, theft from an interstate

shipment—bears no logical relation to defrauding the United States, with which it is linked as an objective of the conspiracy. On the contrary, violation of 18 U.S.C. [1940 ed.] 203—prohibiting a member of Congress from accepting compensation for services rendered in any matter in which the United States is interested—bears an obvious relation to defrauding the United States of its right to the faithful and unbiased services of a member of Congress and officers of the War Department, the defrauding charged (R. 3-5). Consequently the conspiracy charge here is analogous to the conspiracy charge in the *Manton* case, *supra* (conspiracy to obstruct the administration of justice, in violation of 18 U.S.C. [1940 ed.] 241, and to defraud the United States of its right to the faithful and unbiased services of a federal judge), and is clearly not duplicitous.

2. The dissenting judge below was of the view that the conspiracy count in this case is defective for a further reason. His reasoning and conclusion are stated in the following passage of his opinion (R. 180):

> The offense against the United States, violation of 18 U.S.C. § 203 (1946) [*supra*, pp. 3-4] which the defendants are in Count I charged with having conspired to commit is one requiring, from its very nature, concert of action and agreement between the parties involved. The offense is receipt of compensation by a member of Congress for services rendered or

> to be rendered. But receipt of compensation cannot be accomplished without compensation also being given and requires therefore concert of action and agreement between the receiver and the giver. This being so, it is not legally possible to make the commission of such an offense the subject of a conspiracy charge. It is like charging a conspiracy to conspire.

Petitioners now adopt this argument (May Pet. 35-37; Henry Garsson Pet. 54-61; Murray Garsson Pet. 9-12). We submit, however, that the reasoning of the majority opinion below on this issue (R. 165-167) is the sounder, and that there are several answers to the dissenting judge's argument.

(a) In the first place, the argument would seem to be squarely refuted by Mr. Justice Holmes' statement in *United States* v. *Holte,* 236 U.S. 140, 145, that "a conspiracy with an officer or employe of the government or any other for an offence that only he could commit has been held for many years to fall within the conspiracy section, now § 37 of the penal code [citing cases]." See also *Ex parte O'Leary,* 53 F. 2d 956, 957 (C.A. 7), certiorari denied, 283 U.S. 830.

(b) Secondly, it does not follow, we submit, from the fact that there cannot be a receiver of compensation without there also being a giver, that to accuse the giver and the receiver with conspiring to violate a statute which prohibits the

receipt of compensation under specified conditions "is like charging a conspiracy to conspire." True, the receipt of compensation necessarily implies the giving thereof, and the receipt and giving will normally be preceded by agreement. But to charge the two actors in the transaction with conspiring to effect the recipient's act of receiving is not the same thing as to charge them with conspiring to enter into this agreement. 18 U.S.C. [1940 ed.] 203 (the statute which petitioners were charged with conspiring to violate), it is to be observed, itself proscribes both receiving and agreeing to receive (*supra,* pp. 3-4). If count 1 had charged a conspiracy to commit the latter offense (agreeing to receive), the dissenting judge's criticism of the count might have merit. Manifestly, however, it was the former offense (receiving) that was charged as the object of the alleged conspiracy.

(c) Thirdly, *United States* v. *Dietrich,* 126 Fed. 664 (C. C., D. Neb.), on which the dissenting judge relies in this respect (see R. 180-184), involved a charge of conspiracy to violate a statute which specifically proscribed both the receipt and the giving of compensation for certain forbidden purposes (as well as agreement to do either). The decision is therefore distinguishable from the present case, which involves a substantive statute that is silent in respect of giving.

(d) Fourthly, even if the dissenting judge's point were otherwise well taken, the fact remains

that the conspiracy charged by count 1 had for its purpose not only the violation of a specific statute but also the defrauding of the United States (*i.e.*, of and concerning its right to the unbiased services of Congressman May and officials in the War Department (see R. 3-5)). And, as observed by the majority below (R. 167), "the United States can be defrauded without concert of action."

(e) Finally, even if it were true that the conspiracy count is defective for the reasons assigned by the dissenting judge, and even if the alleged conspiracy "merged" in the substantive offenses alleged in counts 3 and 4, as petitioners urge in a cognate contention (May Pet. 35; Henry Garsson Pet. 54), the judgments of conviction still could not be successfully assailed. Each petitioner received an identical sentence of imprisonment under each count, and all sentences were directed to be served concurrently. It is settled law that under such circumstances any good count will sustain the sentences imposed. *Hirabayashi* v. *United States,* 320 U. S. 81, 85; cf. *Pinkerton* v. *United States,* 328 U. S. 640, 641-642, note 1.

3. Petitioners Henry Garsson (Pet. 61-66) and Murray Garsson (Pet. 12-14) further contend that they were improperly charged and convicted on the two substantive counts, 3 and 4, because the statute on which those counts were based (18 U. S. C. [1940 ed.] 203, *supra,* pp. 3-4) denounces only the improper receipt of compensation for services rendered, and does not make criminal the giving of

such compensation.[5] But they, as givers of the compensation, certainly aided and abetted May's receipt thereof, as count 3 [6] charged (R. 15). Under 18 U. S. C. [1940 ed.] 550,[7] therefore, they were equally guilty with May and in fact principals in May's offense.[8] This statute, as remarked by the majority below (R. 167), "provides that whoever aids or abets the commission of any act constituting an offense defined in any law of the United States, is a principal in the offense. No language in the statute before us [*i.e.*, 18 U. S. C. [1940 ed.] 203] makes an exception to that general provision. To sustain appellants' contention, we would have to write, or read, such an exception into the otherwise unqualified general statute dealing with aiders and abettors. We think we cannot do that."

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[5] Petitioner May also argues this point (Pet. 37-39), but since he comes squarely within the proscription of the statute on which counts 3 and 4 are founded, the argument clearly cannot avail him. The dissenting judge below seems to have concluded otherwise (R. 186-187), but we submit that his reasoning on this point does not support the conclusion reached.

[6] Count 4 charged May with "agree[ing] to receive" specified sums in compensation for services rendered, and the Garssons with aiding and abetting such "agreement" (R. 15-17). For the sake of simplicity, only count 3 will be considered in this connection. This is permissible, as we pointed out at p. 23, *supra*, since the sentences on these two counts are identical and run concurrently.

[7] "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

[8] It is well settled that, though a person may be incapable of committing a particular crime, he still may aid and abet its commission and hence be liable as a principal. *Gebardi* v. *United States*, 287 U.S. 112, 120-121, footnote 5; *Barron* v. *United States*, 5 F. 2d 799, 802 (C.A. 1).

It is true that a person's *mere acquiescence* in another's crime, which by its nature cannot be committed without such acquiescence, does not render the person so acquiescing punishable either as a principal or co-conspirator. Thus, it was held in *Gebardi* v. *United States,* 287 U. S. 112, that a woman who is the willing object of a transportation which violates the Mann Act, but who does not aid or assist in the transportation otherwise than by her consent, is not properly chargeable either as a principal in the offense or as a co-conspirator with the principal in its commission. Similarly, "It is not to be supposed that the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would render the former an abettor or a conspirator, * * * or that the acquiescence of a woman under the age of consent would make her a co-conspirator with the man to commit statutory rape upon herself." *Id.,* at p. 123. But where there is something more than mere acquiescence—as, for example, where the willing woman in a Mann Act case "should suggest and carry out [the] journey * * * in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare * * *"—it is settled that there is no legal obstacle to charging the necessary partner in the criminal venture either as an aider and abettor or as a co-conspirator. *United States* v. *Holte,* 236 U. S. 140, 145; cf. *Gebardi* v. *United States, supra,* at 117. We submit that the instant case is one that

is clearly outside the scope of the *Gebardi* decision and the adultery and statutory rape cases considered in that opinion.[9] Nor, we think, does it come within the principle of those cases (see *Gebardi* v. *United States, supra,* at 119) which hold that the purchaser of liquor is not to be regarded as an abettor of the illegal sale. The question is essentially one of the intent of Congress, and, as the opinion of the court below makes clear (R. 167-168), the legislative history of the statutes here concerned does not support the inference that Congress had an unspoken intent to make the active aiding and abetting of the offense proscribed by section 203 of Title 18 an exception to the provisions of section 550 of that title. An intent which may reasonably be imputed to Congress where the question is whether a purchaser of a bottle of liquor from a bootlegger is to be punished as severely as the bootlegger himself cannot reasonably be inferred as to the immensely more serious and dangerous acts here concerned. It is equally unrealistic to liken one who pays a Congressman compensation for service rendered—compensation which it is criminal for the Congressman to accept—and thereby procures vast financial advantages at the expense not only of his competitors but of the nation itself, to the acquiescent female victim in the Mann Act,

[9] The *Gebardi* decision, it is to be noted, was based solely on the Court's belief that "the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent" evidenced "an affirmative legislative policy to leave her acquiescence unpunished" (287 U.S. at 123).

adultery and statutory rape cases with which the *Gebardi* decision was concerned. He clearly does more than "merely acquiesce" in the recipient's offense; he actively aids and abets the commission of the offense.

It is argued, however, that Congress' failure specifically to denounce the giving of compensation in 18 U. S. C. [1940 ed.] 203 evidences an intent to leave the giving unpunishable notwithstanding the aider-and-abettor statute. The fact that a related statute, 18 U. S. C. [1940 ed.] 202 (proscribing the receipt of money or other consideration by members of Congress and others for procuring any contract or appointive office for any person), specifically denounces both the receipt and the giving of such consideration is pointed to as further evidence of such a congressional intent. Concededly, as the majority below observed (R. 168), there would be some force in this argument "if the two sections had been adjoining sections in the same original congressional enactment." But, as the majority also pointed out (*ibid.*), such is not the case. The two sections adjoined in the Criminal Code of 1909 (§§ 112 and 113) and in the Revised Statutes (§§ 1781 and 1782), but were originally enacted on different occasions—the one on July 16, 1862 (c. 180, 12 Stat. 577; amended February 25, 1863, c. 61, 12 Stat. 696) and the other on June 11, 1864 (c. 119, 13 Stat. 123).

4. Petitioners all challenge the sufficiency of the evidence to sustain their convictions (May Pet. 10-

11, 40; Henry Garsson Pet. 24; Murray Garsson Pet. 7). The Government's proof of the existence of the conspiracy charged, however, was, we submit, clear and compelling. The evidence summarized in the Statement, *supra,* at pp. 5-19, is by no means exhaustive, but it suffices to show that the trial court was plainly warranted in submitting the case to the jury. That the evidence was circumstantial is of course not a valid criticism of its sufficiency, since the existence of a conspiracy, from the very nature of the crime, can rarely be established by direct proof. *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664. The evidence under substantive count 3 is also clearly sufficient (see paragraph (f), *supra,* pp. 14-15), and there is no occasion to demonstrate the sufficiency of the proof under the other substantive count, 4, since each petitioner's sentence on the latter count is identical with his sentence on the former, and runs concurrently with it.[10]

5. Petitioners May and Henry Garsson both testified before the Senate War Investigating Committee (the so-called Mead Committee), prior to their indictment, concerning various matters relating to the facts in this case. May testified voluntarily. Henry Garsson appeared under subpoena,

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[10] We mention the substantive counts in this connection, notwithstanding that each petitioner's sentences on all counts are identical and run concurrently, for the reason that violation of 18 U.S.C. [1940 ed.] 203, on which the substantive counts are predicated, renders the offender incapable thereafter of holding "any office of honor, trust, or profit under the Government of the United States"—a disability not incurred as a result of conviction on the conspiracy count.

and, it appears, "made a general statement claiming and refusing to waive 'his constitutional privilege' [against self-incrimination]" (R. 164, 161-162). Nevertheless, Henry Garsson "did not refuse to answer any question; so far as the record shows, he was not compelled" (R. 164). These petitioners now contend that, by virtue of their having testified before the Committee, they automatically obtained immunity from prosecution for the offenses of which they have been convicted (May Pet. 30-32; Henry Garsson Pet. 68-74). The contention is clearly without merit.

There is no statute, applicable to testimony before a congressional committee, comparable to those involved in *Smith* v. *United States,* No. 292, 1948 Term, decided May 31, 1949, and *United States* v. *Monia,* 317 U. S. 424, whereby self-incriminating testimony may be compelled, and in exchange, as it were, for such deprivation of what would otherwise be a constitutional right, there is conferred immunity from prosecution "for or on account of any transaction, matter, or thing" concerning which testimony is given. These petitioners' attempt to "spell out" such immunity from two statutes—28 U.S.C. [1946 ed.] 634 [11] and 2 U.S.C. [1946 ed.] 192 [12]—is

[11] "No testimony given by a witness before either House, or before any committee of either House, * * * shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

[12] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony

patently futile. The former is simply what it purports to be—a statute forbidding the use of a witness' testimony before a congressional committee in any subsequent criminal proceeding against him; it does not confer immunity from prosecution. *Counselman* v. *Hitchcock,* 142 U.S. 547, 564-565, 585-586. The latter makes it an offense to refuse to divulge pertinent information to a congressional committee; but it cannot constitutionally be construed, by virtue of the bar of the Fifth Amendment, to apply to self-incriminating testimony. *Counselman* v. *Hitchcock, supra.* In fact, it is precisely for the purpose of compelling self-incriminating testimony that immunity statutes have been enacted. *Smith* v. *United States, supra; Shapiro* v. *United States,* 335 U.S. 1, 28-29; *Brown* v. *Walker,* 161 U.S. 591, 594-595. And, as we have indicated, no such statute has been enacted relative to testimony before a congressional committee. Consequently, neither May nor Henry Garsson could have been compelled to incriminate himself before the Mead Committee. Indeed, the fact that Henry Garsson stated to the Committee that he was not waiving his constitutional privilege against self-incrimination shows that he was well aware of that fact. This case, therefore, simply

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or to produce papers upon any matter under inquiry before either House, * * * or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine * * * and imprisonment * * *."

does not involve any question of immunity.[13]

6. Petitioner Henry Garsson contends (Pet. 79-83) that a certain stenographer's notebook (G. Ex. 179, Tr. 5909) was erroneously received in evidence. He charges that it was his personal property and was unlawfully seized without a warrant. The contention is clearly without merit.

The notebook in question was one of a large number of items taken by agents of the Government from Batavia Metal Products, Inc., pursuant to a subpoena *duces tecum* directed to that company. The items were voluntarily surrendered by attorneys for the company. Some of the items subsequently proved to be personal property of Henry Garsson and were returned to him. Others, including the notebook in question, were not re-

[13] A related contention of petitioners May (Pet. 32-34) and Henry Garsson (Pet. 73-74) is that "testimony given" by them before the Mead Committee was used against them in this prosecution, in violation of 28 U.S.C. [1946 ed.] 634 (quoted in pertinent part in footnote 11, *supra*, p. 29). However, neither refers to any specific testimony given by him before the Committee and allegedly used by the prosecution against him in this case, and in fact there was none. It is not true that "It has never been denied by the prosecution that [May's] testimony [before the Committee] was used before the grand jury" (May Pet. 33). On the contrary, the prosecution categorically denied this charge, made in connection with several pre-trial motions attacking the indictment (R. 38; see also Transcript of proceedings on February 21 and 25, 1947, pp. 109-111). Both these petitioners also suggest (May Pet. 33; Henry Garsson Pet. 73-74) that some of the evidence presented by the Government to the grand jury resulted from "leads" obtained from their testimony before the Committee. It is not necessary, however, to consider whether, even if this were true, it was forbidden by the statute in question, since in each instance the suggestion is sheer speculation.

turned for the reason that they were corporate property of Batavia and hence properly received under the subpoena. (See Transcript of proceedings on April 3 and 9, 1947, pp. 53-81.) There can be no doubt that this notebook was corporate property and contained notes of corporate business. See Henry Garsson's testimony on cross-examination at the trial (Tr. 4458-4462). It was therefore properly taken pursuant to the subpoena. *Wilson* v. *United States,* 221 U.S. 361.

We have thus far discussed and answered what we consider to be the principal contentions of the petitions for certiorari. Petitioners make a number of other contentions, but to answer each in detail would unduly lengthen this brief in opposition to certiorari. We think it is unnecessary to do so. Each of the remaining contentions is carefully examined and rejected in the majority opinion below, which in our judgment fully demonstrates their lack of merit. None of these contentions, moreover, was found meritorious by the dissenting judge, whose opinion was based entirely on what he thought were defects in the indictment (R. 176). We have already discussed each of these alleged defects. For the convenience of the Court, we set forth below the nature of petitioners' additional contentions, references to the pages of the petitions in which they are made, and references to the majority opinion where they are considered:

(1) Alleged illegal constitution of the grand jury (May Pet. 39-40; Henry Garsson Pet. 75-78; Murray Garsson Pet. 15-16); considered below at R. 164.

(2) Refusal to strike all the evidence concerning the acquitted codefendant Freeman (May Pet. 43-45; Henry Garsson Pet. 84-85); considered below at R. 169.

(3) Exclusion of evidence as to alleged discrimination by the War Department against the Garssons' companies, the excellent production records of the companies, the functions of the Military Affairs Committee, justification of the complaints made to May by the Garssons, etc. (May Pet. 46-49); Henry Garsson Pet. 97-104); considered below at R. 172-173; see also R. 170.

(4) Alleged errors in admitting evidence (Henry Garsson Pet. 86-96); considered below at R. 169-170.

(5) Alleged errors in the charge and refusal to grant certain requested instructions (May Pet. 49-51; Henry Garsson Pet. 112-123); considered below at R. 176.

(6) Alleged unfairness of the trial (May Pet. 51-52; Henry Garsson Pet. 105-111); considered below at R. 173-175.

CONCLUSION

The petitions for writs of certiorari do not, in our opinion, present any question requiring further review by this Court. We therefore respectfully submit that they should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 101.

MURRAY W. GARSSON, *Petitioner,*

v.

UNITED STATES OF AMERICA.

No. 102.

HENRY M. GARSSON, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

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MURRAY W. GARSSON, *Petitioner,*

v.

UNITED STATES OF AMERICA.

No. 102.

HENRY M. GARSSON, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Murray W. Garsson and Henry M. Garsson, Petitioners, respectfully pray for a rehearing and reversal of the orders hereinbefore entered on the 10th day of October, 1949, denying their Petitions for Writs of Certiorari to the

United States Court of Appeals for the District of Columbia and as grounds for such rehearings set forth the following:

I.

That two of the principal questions presented for decision by this Court concerned the interpretation and construction of two groups of statutes: (a) R. S. 1782, March 4, 1909 c. 321 Section 113, 35 Stat. 1109, as amended (18 U. S. C. A. 203) and, (b) R. S. 102, as amended June 22, 1938, c. 594, 52 Stat. 942 (2 U. S. C. A. 192); R. S. 103, as amended June 22, 1938, c. 594, 52 Stat. 942 (2 U. S. C. A. 193), and R. S. 859, as amended June 22, 1938, c. 594, 52 Stat. 943 (28 U. S. C. A. 634). 18 U. S. C. A. Section 203 prohibits a Congressman from receiving or agreeing to receive any compensation for services in any matter in which the United States is interested. The statutes in group (b) pertain to testimony given by a witness before a Congressional Committee.

The Petitions for Writs of Certiorari in the above cases raise many questions of substance relating to the interpretation, construction or application of said statutes, were denied. It may be that this action was taken on the ground that there was no conflict of decision among the various Courts of Appeals relative thereto. Although the importance of the questions relative to these statutes was presented in the Petitions, petitioners did not argue that prosecutions elsewhere with the resulting conflict of decision was improbable because such statutes would be most likely to be violated only in the District of Columbia. Because of the concentration of Governmental departments, bureaus and agencies in the District of Columbia, and of the time spent by members of Congress in said District, it is most probable that 18 U. S. C. A. Section 203, if violated, would be violated in that District. Also, because of the existence of the foregoing facts, Congressional investigations will be held most probably in said District rather than elsewhere in the United States.

This Court's attention is called to the fact that this case was the first prosecution by the Government under 18 U. S. C. A. 203 of a person other than a Congressman, against whom the prohibition of that Section is specifically directed. There is no decision by this Court on the question whether any one other than a Congressman may be indicted under 18 U. S. C. A. 203 as an aider and abettor. In the absence of the probability of a conflict of decision in other Courts of Appeal, and in view of the probability that such prosecutions will be brought only in the District of Columbia, it is important to the administration of justice that this Court grant certiorari in these cases in order that an important question of Federal administration be decided and settled.

The preceding ground for rehearing constitutes a substantial ground, which was available to petitioners although not previously presented in their Petitions for Writs of Certiorari. Said ground is analogous to that presented in the petition for rehearing in the case of *Schriber-Schroth Company* v. *Cleveland Trust Company,* 305 U. S. 47, 573; 59 S. Ct. 810, in which this Court granted certiorari on a petition for rehearing showing that, notwithstanding the doubtful validity of certain patents, "litigation elsewhere with the resulting conflict of decision was improbable because of the concentration of the automobile industry in the 6th Circuit."

II.

That a further reason for granting a rehearing is an intervening circumstance of substantial and controlling effect —that since the filing of the Petitions on June 3, 1949, the Supreme Court, on June 27, 1949, in the case of *Eugene Dennis, Petitioner* v. *United States of America,* at No. 436, October Term, 1949, granted a Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia, limited to the question whether Government employees could properly serve on the jury which tried the petitioner.

This decision by this Court bears on the question presented in petitioners' briefs (Henry M. Garsson Brief, 75-79, Murray W. Garsson Brief, 15) whether the petitioners were indicted by an illegally constituted Grand Jury. The Court of Appeals in summarily rejecting petitioners' challenge of the composition of the Grand Jury on the ground that is consists of more than half of Government employees, and that two of its members were completely disqualified, followed the decision in *Frazier* v. *United States*, 335 U. S. 497, that Government employees are eligible to sit as jurors.

The Court of Appeals in the *Dennis* case, 171 Fed. (2d) 986, 991-992, upheld the District Court's action in overruling the challenge of all talesmen who were Government employees. Petitioners maintain that the granting by this Court of certiorari in the *Dennis* case shows a departure from its decision in *Frazier* v. *United States*, 69 S. Ct. 201. This Court's action shows a growing apprehension and realization of the obstacles to a fair trial presented by a petit jury composed principally of Government employees. This Court's attention is also called to dissenting opinions by Judges Jackson, Frankfurter, Douglas and Murphy in the *Frazier* case. Mr. Justice Jackson particularly pointed out the danger of a "packed jury" where the offense was against no one except Federal Government policy, i.e. the Secretary of the Treasury. Judge Jackson, in his dissenting opinion, states, 69 S. Ct. 201, 210:

> "On one proposition I should expect trial lawyers to be nearly unanimous: that a jury, every member of which is in the hire of one of the litigants, lacks something of being an impartial jury. A system which has produced such an objectionable result and always tends to repeat it, should, in my opinion, be disapproved by this Court in exercise of its supervisory power over federal courts."

The dangers inherent in the Grand Jury investigation and in the trial of cases in the District of Columbia involv-

ing offenses against no one except Federal Government policy—[in these cases, particularly against the General Accounting Office]—make it impossible for defendants charged with such offenses to receive a fair trial in said District at the hands of either a Grand Jury or a petit jury composed largely of Government employees. The Mead Committee investigation, which preceded the Grand Jury investigation and the trial itself, publicized unsworn and rash statements made by members of the investigating committee. The publicity given to the Mead Committee hearings was so widespread that no one in the District of Columbia at that time could have been ignorant of the charges made against these defendants. Comments made by members of the Committee were powerful enough to prejudice both the Grand Jurors and the petit jurors against these defendants before the trial even started.

Objections were made in these cases to the composition of both the Grand Jury and the petit jury. Said juries had a one-sided outlook on the case before them. The petitioners were deprived of a fair and impartial trial not only because they were tried by a jury, most of those members were prejudiced against them, but also by jurors whose minds could not have helped but be biased against the petitioners as a result of comments made during the Mead investigation.

In view of this Court's action in granting certiorari in the *Dennis* case, limited to the question whether Government Employees could properly serve on the jury which tried petitioner therein, petitioners in the above cases maintain that there is more reason for granting certiorari in their cases—because in the *Dennis* case at least the defendant had the opportunity to examine the petit jurors for possible bias. Such an opportunity was not available in the case of the Grand Jury which indicted our petitioners.

III.

That a further reason for granting a rehearing as to petitioner Henry M. Garsson is that since the filing of his Petition, the Government in its brief (Br. 28-31) admits that petitioners May and Henry Garsson both testified before the Senate War Investigating Committee prior to their indictment concerning various matters relating to the facts in this case, that Henry Garsson appeared under subpoena, and, "made a general statement claiming and refusing to waive 'his constitutional privilege' (against self-incrimination)" (R. 161-162, 164). Although the Government contends that the two statutes involved, 28 U. S. C. A. 634 and 2 U. S. C. A. 192 do not "spell out" immunity from prosecution "for or on account of any transaction, matter, or thing" concerning which testimony is given before a Congressional Committee, nevertheless it does stress that Henry Garsson "did not refuse to answer any question; so far as the record shows he was not compelled" (R. 164). The Government's position is thus most inconsistent. It recognizes by the last statement that the statutes do grant immunity; otherwise it would not have had to argue that Henry Garsson "did not refuse to answer any question" after he had made a general statement claiming and refusing to waive his constitutional privilege. Respondent argues that Henry Garsson did not obtain immunity because he was not compelled to give the testimony which he did. This argument and the decision in the Court below on this point are difficult to understand.

This Court has ruled in *Smith* v. *United States,* 292 1948 Term decided May 31, 1949, 69 S. Ct. 1000, and in *United States* v. *Monia,* 317 U. S. 424, that it is not necessary for a witness each time a question is asked to raise the constitutional question involved and then be forced to answer before immunity attaches in the giving of testimony before a Congressional Committee. The Government's argument that the statutes herein relied on to give petitioner Henry Garsson immunity—28 U. S. C. A. 634, and 2 U. S. C. A.

192—are not comparable to the statutes involved in the *Smith* and *Monia* cases is fallacious.

Next the respondent argues that no immunity statute has been enacted relative to testimony before a Congressional Committee and that, consequently, neither May nor Henry Garsson could have been compelled to incriminate himself before the Mead Committee, if he raised the constitutional question. And yet in two recent cases, wherein Petitions for Writs of Certiorari are pending in this Court, *Lawson* v. *United States* and *Trumbo* v. *United States,* 176 Fed. (2d) 49 (C. C. A. D. C.) the Government brought prosecutions for violations of 2 U. S. C. A. Section 192, 52 Stat. 942 (1938), which makes it a misdemeanor to refuse to answer "any question (of a Congressional Committee) pertinent to the question under inquiry". Thus, using the very statutes herein involved, respondent indicted, tried and convicted for contempt witnesses before Congressional Committees, who, in reliance upon their constitutional right, refused to answer questions put to them by such Committee.

The position of the Solicitor General in upholding the constitutionality of 2 U. S. C. A. 192 in the *Lawson* and *Trumbo* cases and, in effect, attacking the constitutionality of the same statute in our cases because it is not an immunity statute within the so-called definitions of the *Smith* and *Monia* cases, presents a question of importance in the administration of Federal criminal justice which should be decided by this Court.

Petitioner Henry Garsson maintains that he comes within the protection given by this Court to the defendant in the *Smith* case, because it is plain that he relied from the beginning of his examination upon his privilege against self-incrimination. The United States had notice that the witness sought protection against prosecution for any facts to which he was compelled to testify. As stated by this Court, 69 S. Ct. 1000, 1007: " . . . Although the privilege against incrimination must be claimed, when it is claimed

it is guaranteed by the Constitution. Thereafter only absolute immunity from Federal criminal prosecution is sufficient to compel the desired testimony . . . "

This is the first time the Supreme Court has been called upon to pass upon the immunity of a witness, who has testified before a Congressional Committee after refusing to waive his constitutional rights.

Previous cases before the Court have involved immunity before other governmental bodies or juries.

A witness before a congressional committee, under the statutes can not refuse to testify even on the grounds of self-incrimination.

He may be prosecuted for contempt if he refuses to testify, and he may be prosecuted for perjury if he should testify falsely.

IV.

That respondent, in its Brief (Br. 23), argues that even if the conspiracy count is defective for the reasons assigned by the dissenting Judge in the lower Court and even if the conspiracy count is "merged" in the substantive offenses charged in Counts 3 and 4, the judgments of conviction still could not be successfully assailed because each petitioner received an identical sentence of imprisonment under each count, and all sentences were directed to be served concurrently. The Government argues that under such circumstances any good count would sustain the sentences imposed. The difficulty with this argument is that a great mass of so-called conspiracy evidence was received under Count 1—the so-called overt acts related to Count 1. This evidence, which was not admissible to prove the substantive offenses alleged in Counts 3 and 4 (*Glasser* v. *United States*, 315 U. S. 60, 73-75), was not only submitted to the jury as proof under Count 1, but was also used under Counts 3 and 4. Thus, assuming that Count 1 was defective, the petitioners were prejudiced by the jury's being

permitted to consider the testimony erroneously admitted under Count 1 as to all the counts in the indictment.

V.

That in its Brief (Br. 27-28), respondent answered petitioners' contention that the evidence was insufficient to sustain the convictions by making a sweeping statement that the Government's proof of existence of the conspiracy charged, as set forth in the Statement (Br. 5-19), is clear and compelling. The Government adroitly avoids any reference to *Glasser* v. *United States,* 315 U. S. 60, wherein this Court held that admissions of statements by conspirators in the absence of another co-conspirator cannot be used to establish a conspiracy until there is proof aliunde of the existence of conspiracy. All the evidence set forth in the respondent's Statement (Br. 5-19) pertained to alleged overt acts, done in pursuance of conspiracy, and after it was charged to have been formed. The Trial Court found that each and every of the overt acts in respondent's Statement was legal in and of itself.

The Government, by failing to point out any independent evidence in this Record to establish the conspiracy or to establish the petitioners' connection with it other than through admittedly legal overt acts, admits that no such independent evidence is to be found in the Record.

VI.

That the respondent, in its Brief (Br. 32), misstates the position of the dissenting Judge in the lower Court. The Government stated that none of the other contentions made by the petitioners "was found meritorious by the dissenting Judge, whose opinion was based entirely on what he thought were defects in the indictment." (R. 176) This is a misstatement of the fact, for the reason that Judge Stephens, the dissenting Judge, did not even consider these points, as his decision held the indictment and the convic-

tions thereon invalid and, therefore, he did not believe it necessary to consider the other points raised. As stated by Judge Stephens:

> "The defects which I think exist in the indictment are obviously of substantial character and cannot therefore be disregarded under 18 U.S.C. § 556 (1940) or Rule 52(a), Federal Rules of Criminal Procedure. A precedent supporting an indictment with such substantial defects should I think not be set."

CONCLUSION.

WHEREFORE, upon the foregoing grounds, the petitioners respectfully pray that this Petition for Rehearing be granted, and that the orders heretofore entered by this Court on October 10, 1949 denying their Petitions for Writs of Certiorari to the Court of Appeals for the District of Columbia, be reversed.

Respectfully submitted,

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We, SAMUEL GOLDSTEIN, attorney for Petitioners, and PERRY W. HOWARD, of counsel for Petitioner Murray W. Garsson, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and further, that the Petition is restricted to the grounds specified in Amended Rule 33(2) of the Rules of the United States Supreme Court.

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